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Claude L. Stuart, III

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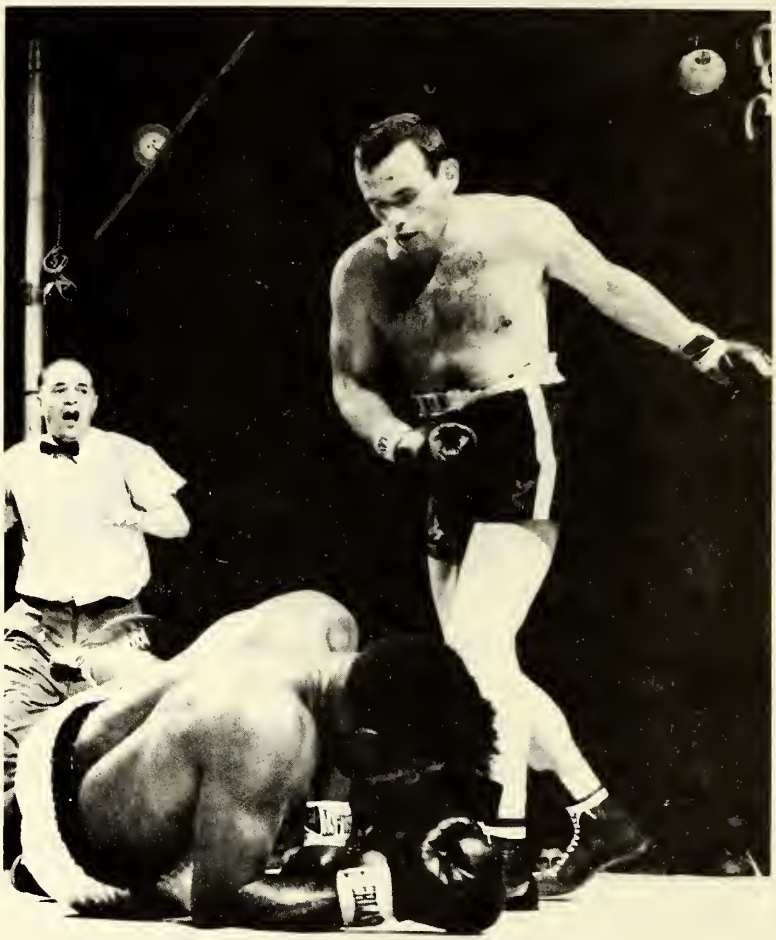

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SUMMARY JUDGMENT: A TRIAL PRACTITIONER'S GUIDE TO MISSISSIPPI RULE OF CIVIL PROCEDURE 56

Claude L. Stuart, III

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SUMMARY JUDGMENT: A TRIAL PRACTITIONER'S GUIDE TO MISSISSIPPI RULE OF CIVIL PROCEDURE 56

*Claude L. Stuart, III**

I. Introduction

Summary judgment did not become widely available as a technique for resolving legal disputes without the necessity for trial in the United States until the adoption of the Federal Rules of Civil Procedure in 1938.[1] Although the concept was not new,[2] the summary judgment procedure had operated only on a limited scale in the United States before the advent of the Rules.[3] Rule 56 has met with some skepticism, if not suspicion, especially as it is sometimes feared that the summary procedure, for all its efficiency, may undermine the right to jury trial.[4] Despite its reputation as a "drastic remedy,"[5] however, summary

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This article is adapted from a paper originally delivered on December 1, 1989, at a seminar on Pretrial Dispositive Motions and Sanctions which was sponsored by the Mississippi College School of Law. The original presentation consisted of 88 questions playing on the logically harmonic and numerological convergence between Rule 56 and Memphis Radio Station 56 (WHBQ), which formerly featured heavily the rock and roll sounds of Jerry Lee Lewis' pumping piano and later inexplicably switched to a talk format consisting of questions and answers. Hence, the oral presentation was subtitled "Jerry Lee's 88 Keys to Rocking with Rule 56." Mississippi College School of Law has graciously granted any necessary permission for the publication of this revised and updated article. The author gratefully acknowledges the invaluable and indefatigable assistance of fellow firm member Robert N. Warrington in preparing this article.

[1] *See* C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2711, at 556-57 (2d ed. 1983) [hereinafter Federal Practice and Procedure].

[2] A forerunner of the American summary judgment procedure had existed in England. Bauman, *The Evolution of the Summary Judgment Procedure*, 31 Ind. L.J. 329, 343 (1956); *see also* Federal Practice and Procedure, *supra* note 1, § 2711, at 556.

[3] Federal Practice and Procedure, *supra* note 1.

[4] *See* Bauman, *supra* note 2, at 354-55.

[5] *See* Barber v. General Elec. Co., 648 F.2d 1272, 1276 n.1 (10th Cir. 1981); National Life Ins. Co. v. Solomon, 529 F.2d 59, 61 (2d Cir. 1975); Redhouse v. Quality Ford Sales,

judgment has now gained a strong footing in both federal and state practice.[6]

Nevertheless, Rule 56 is a relative newcomer to Mississippi practice. The Mississippi Rules of Civil Procedure were not adopted by the Mississippi Supreme Court until May 26, 1981. By the terms of the adopting order, the Rules became effective in all civil actions commenced on or after January 1, 1982.[7] Two chief factors led to the Rules' adoption: primarily, the assertion of the Mississippi Supreme Court's inherent rule-making authority; and, inferentially, the Federal Rules of Civil Procedure experience.[8] There was no pre-Rule counterpart to Rule 56 in Mississippi: "there was no such thing as summary judgment in state court practice,"[9] and it was "unknown to our former

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Inc., 511 F.2d 230, 234 (10th Cir. 1975); Consolidated Elec. Co. v. United States *ex rel.* Gough Indus., Inc., 355 F.2d 437, 438 (9th Cir. 1966); *see also* Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 776 (1983) (noting uncertainty of courts in dealing with summary judgment). Using even stronger language, the United States Court of Appeals for the Fifth Circuit, in Brunswick Corp. v. Vineberg, 370 F.2d 605 (1967), termed the summary procedure a "lethal weapon" and cautioned that courts must "beware of overkill in its use." *Id.* at 612.

[6] *See* Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53, 53 (1988) (noting United States Supreme Court's approval of summary judgment); *see also infra* text accompanying notes 290-301.

[7] Brown v. Credit Center, Inc., 444 So. 2d 358, 361 (Miss. 1983). Actually Rule 56 and its Comment in precisely identical language first appeared in the Proposed Mississippi Rules of Civil Procedure published by the Mississippi Supreme Court in 1978. The Advisory Committee on Rules of Civil Practice and Procedure was authorized during the 1975 Regular Session of the Mississippi legislature by enactment of MISS. CODE ANN. §§ 9-3-61 to -69 (Supp. 1989). Ironically, the corrigenda to the publication notes the erroneous reference to subsection (b) in the Comment should have been subsection (g). The original error was unfortunately carried over to the Comment to the present rule. *See infra* text accompanying note 18.

[8] *See* Hall v. State, 539 So. 2d 1338, 1344-48 (Miss. 1989) (court gives excellent historical analysis and its continued present justification for its inherent rule-making authority in context of holding unconstitutional the Evidence of Child Sexual Abuse Act, MISS. CODE ANN. §§ 13-1-401 to -415 (Supp. 1988), in the face of MISS. R. EVID. 802); Newell v. State, 308 So. 2d 71, 76 (Miss. 1975); Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287 (1972); Comment, *Procedural Reform in Mississippi: A Current Analysis*, 47 MISS. L.J. 33 (1976) (authored by Eric Campbell Schweitzer & Francis McRae Turner III). *See generally* Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, 3 MISS. C.L. REV. 45 (1982); Page, *Constitutionalism and Judicial Rule Making: Lesson from the Crisis in Mississippi*, 3 MISS. C.L. REV. 1 (1982).

[9] Stringer v. Bufkin, 465 So. 2d 331, 332 (Miss. 1985). One could argue that it bears

procedure."[10]

Accordingly, our court has not looked to any pre-1982 authority but has cut its interpretation of Rule 56 from new cloth by using the text of the Rule itself, the comment of the Advisory Committee on Rules respecting the Rules,[11] and persuasive federal authority construing substantially identical language.

Unlike the federal courts' experience of over half a century with Rule 56, Mississippi jurisprudence has not yet reached its first full decade of using the summary judgment procedure. Still, in this short time, the Mississippi Supreme Court has already decided over 130 summary judgment cases presenting a myriad of circumstances. Indeed, there now exists a well-established body of case law not only defining the basic contours, but also exploring many of the nuances of Rule 56.[12]

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certain similarities to the demurrer. Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1061 (Miss. 1984). However, Rule 56 bears a stronger resemblance to the formerly verboten "speaking demurrer." *See* Holland v. Kennedy, 548 So. 2d 982, 983 (Miss. 1989) ("surely the last hurrah of the late, but we trust not lamented, demurrer") (citing Robinson v. Hawkins, 541 So. 2d 1048 (Miss. 1980)); Satcher v. Wiser, 483 So. 2d 694, 697 (Miss. 1986)). For a discussion of the speaking demurrer, see V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 289 (2d ed. 1950). For further discussion of the abolishment of the demurrer, see also Miss. R. Civ. P. 7 comment.

[10] Smith v. H.C. Bailey Cos., 477 So. 2d 224, 233 (Miss. 1985) (citing Holland v. Kennedy, 454 So. 2d 1305 (Miss. 1984) and Litten v. Grenada County, 437 So. 2d 387 (Miss. 1983)).

[11] The Mississippi Supreme Court has never formally adopted the official comments to the Mississippi Rules of Civil Procedure. On January 31, 1990, the court entered an order amending the "Official Comments" to Rules 4, 12, 37, 54 and 77. Previously, on January 10, 1986, the court had entered an order amending "Official Comments" to Rules 4, 32, 43, and 81. However, the Order of May 26, 1981, adopting the rules originally is silent about adopting or approving any comments. Nevertheless, several cases have referred to the comments as "official." Gilchrist Mach. Co. v. Ross, 493 So. 2d 1288, 1292 (Miss. 1986); Stanton & Assocs. v. Bryant Constr. Co., 464 So. 2d 499, 505 n.6 (Miss. 1985). Other cases have referred to the comments with apparent approval. *See* Pope v. Schroeder, 512 So. 2d 905, 908 (Miss. 1987) (referring to the "Official Comment, Rule 56, Miss. R. Civ. P."); Walker v. Cleveland Lumber Co., 512 So. 2d 695, 696 n.2 (Miss. 1987) (same). One is probably safe in concluding that all of the comments have been approved by retroactive implication. This article will indulge in this assumption. However, one must note that the Mississippi Rules of Evidence were adopted September 24, 1985, by an Order which specifically provided, "The comments appended to each rule . . . are adopted as the Official Comments of the Court and these Comments shall be used by all Courts as authoritative guides to the interpretation of these Rules." Perhaps the Advisory Committee on Rules established by the court's Order of November 9, 1983, can address this problem "officially."

[12] *See infra* text accompanying notes 283-301.

The purpose of this article is to explicate Mississippi Rule of Civil Procedure 56 by reviewing the Rule itself, its comment, and the major cases construing the Rule.[13] To do so, the article will pose a series of interlocking questions about summary judgment in a logically progressive sequence for the trial practitioner. It is hoped that the answers to the questions will provide not only insight as to how the Rule works, but also textual and case support for its construction. In addition, the article will address some of the as-yet-unanswered questions which may arise in the construction of Rule 56 and offer suggestions for their possible resolution.

II. Questions for the Trial Practitioner

A. The Background and Purpose of Rule 56

1. Does Mississippi Rule of Civil Procedure 56 differ from Federal Rule 56?

Although the Mississippi Supreme Court has noted that "Federal Rule 56 is identical to our Rule 56,"[14] the rules actually differ textually in three largely non-material respects:

(1) Mississippi Rule of Civil Procedure 56(a) permits the claimant to move for summary judgment no earlier than thirty days after commencement of the action,[15] whereas the time in federal court is twenty days. This difference is obviously related to the times to file responses in the respective courts.[16]

(2) Only the Mississippi rule has subsection (h), which mandates the award of reasonable expenses to the prevailing party "incurred in attending the hearing of the motion" and furthermore permits the award of attorney's fees if the "motion is with-

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[13] As of April 1, 1990, there were over 130 cases construing Miss. R. Civ. P. 56. While a concerted effort has been made to highlight the leading cases, to underscore the salient points of the second and third tier decisions, and to winnow out the jurisprudentially inconsequential cases, this article does not purport to be a totally comprehensive review of all decisions. Rather, it is intended to be a good jumping-off point for further research. For an abstract and topic index of all cases discussed in this article, see *infra* Appendices A, B.

[14] Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 n.1 (Miss. 1988).

[15] Miss. R. Civ. P. 3 defines commencement of the action as filing. *Id.*

[16] *See infra* text accompanying note 55.

out reasonable cause." There have been no cases substantively construing Rule 56(h).[17] Only the comment to Rule 56 (the "Comment") is available to explain this subsection. The Comment notes that subsections (g) (erroneously referred to as "b" in the Comment)[18] and (h) are intended to deter abuses of summary judgment practice. Thus the trial court *may* impose sanctions for improper use of summary judgment[19] and *shall*, in all cases, award expenses to the party who successfully defends a motion for summary judgment.[20] Rule 56(h) appears to incorporate an objective standard precluding the "empty head but pure heart" defense in accord with the Litigation Accountability Act of 1988[21] and the present construction of Mississippi Rule of Civil Procedure 11.[22]

(3) Finally, by amendment effective August 1, 1987, Federal Rule 56 was rendered gender-neutral.[23] The Mississippi rule retains the masculine touch.

It is well to keep in mind the substantively identical nature of Mississippi Rule 56 and its federal counterpart, since federal authority on undecided state issues is highly persuasive, if not virtually controlling.[24]

2. *What is the purpose of Rule 56?*

The broad purpose of Rule 56 is to expedite the determination of matters on their merits and eliminate unmeritorious

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[17] The Mississippi Supreme Court in Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 376 (Miss. 1987), mentioned Rule 56(h) in the context of noting that it does not apply to Rule 12 motions. *See infra* text accompanying notes 239-41.

[18] *See supra* note 7.

[18] MISS. R. CIV. P. 56(g).

[20] *Id.* 56(h).

[21] MISS. CODE ANN. §§ 11-55-1 to -15 (Supp. 1989).

[22] *See, e.g.*, Tricon Metals & Servs, Inc. v. Topp, 537 So. 2d 1331, 1335 (Miss. 1989) ("*Tricon II*"); Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117, 1120 (Miss. 1989). *See generally* Cochran, *Sanctions Under Rule 11*, 3 FIFTH CIRCUIT REPORTER 209 (March 1986); Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 MISS. C.L. REV. 111 (1988).

[23] For the specific changes, see *Proposed Amendments to the Federal Rules of Civil Procedure*, 113 F.R.D. 273-360 (1987). The Advisory Committee noted the amendments were technical and no substantive changes were intended. *Id.* at 334.

[24] *See infra* text accompanying notes 302-06.

claims or defenses without the necessity of a full trial.[25] It is essentially "an efficiency device, in the sense that, [because] judicial resources are limited," utilization of courts should be restricted to those cases "which really do require trial on the merits."[26]

3. *For what is summary judgment not to be used?*

The Mississippi Supreme Court has made it clear that the problem of overcrowded dockets is not to be solved by excessive entries of summary judgments.[27] Furthermore, summary judgment is not intended to be a trial by affidavit, nor is it a shortcut to determination in open court of issues that are frequently factual.[28]

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[25] MISS. R. CIV. P. 56 comment. As the Comment makes clear:

> Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary judgment in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

See also Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 6 (Miss. Jan. 3, 1990).

[26] Robertson, *Mississippi's Summary Judgment Experience*, 9 VOIR DIRE 14, 14 (1987). This compact article is a succinct compendium of the major cases under Rule 56 decided through the middle of 1987 and has provided a basic analytical framework for this article.

[27] Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 636 (Miss. 1989) (citing 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.-15[1.-2] (2d ed. 1988)); Brown v. McQuinn, 501 So. 2d 1093, 1095 (Miss. 1986); Brown v. Credit Center, Inc., 444 So. 2d 358, 363 (Miss. 1983).

[28] Ratliff v. Ratliff, 500 So. 2d 981, 981 (Miss. 1986); *see* Pope v. Schroeder, 512 So. 2d 905, 908 (Miss. 1987) (list of 13 cases holding that "Summary Judgment is not to be a substitute for a trial of disputed fact issues"); *cf.* Crystal Springs Ins. Agency v. Commercial Union Ins. Co., 554 So. 2d 884, 885-86 (Miss. 1989) (role of credibility vis-a-vis summary judgment in fraud context). *Compare* Sanders v. State, 440 So. 2d 278, 285 n.4 (Miss. 1983) (using Rule 56 as an analog in discussing dispensing with full evidentiary hearing) *with* Neal v. State, 525 So. 2d 1279, 1282 n.2 (Miss. 1987) ("summary judgment is available under Uniform Post Conviction Collateral Relief Act" and "[a]s in civil ac-

B. Scope and Operation of the Rule

1. Can a motion for summary judgment be used in conjunction with actions for declaratory judgment and/or injunctive relief?

A motion for summary judgment may be filed in an action seeking either a declaratory judgment, or injunctive relief, or both.[29]

2. Can the motion be partial?

The motion need not go to the whole case. The court can enter partial summary judgment on issues where there are no disputes regarding material facts and leave the remainder of the case for trial on the merits.[30] Consequently, "[t]he courts and litigants are free to concentrate on the real to the exclusion of the pretended."[31] By the same token, in a multi-party case the court may grant summary judgment against one party but not against others.[32]

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tions, we do not resolve genuine issue of material fact by a process of trial by affidavit").

[29] MISS. R. CIV. P. 56(a). "[A] party seeking . . . to obtain a declaratory judgment may . . . move . . . for a summary judgment." *Id.*; *see, e.g.*, Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 437 (Miss. 1989) (cross-motions for summary judgment to declare rights under uninsured motorist provision of automobile insurance contract); Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333, 1335 (Miss. 1987) (cross-motions for summary judgment seeking injunctive as well as declaratory relief under sales tax statute); *see also infra* text accompanying notes 88-90.

[30] MISS. R. CIV. P. 56(d); *see* State Highway Comm'n v. Charmar, Inc., No. 07-CA-58846, slip op. at 11 (Miss. Mar. 28, 1990); Hopton Bldg. Maintenance, Inc. v. United Parcel Serv., Inc., No. 07-CA-59086, slip op. at 3 (Miss. Mar. 14, 1990) (affirming grant of summary judgment on cross-claim for indemnity); Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1323-25 (Miss. 1989); *In re* Estate of Smiley, 530 So. 2d 18, 25 (Miss. 1988); Hicks v. Thomas, 516 So. 2d 1344, 1348 (Miss. 1987); Phillips v. Hull, 516 So. 2d 488, 494-95 (Miss. 1987); Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1061 (Miss. 1984); Dennis v. Searle, 457 So. 2d 941, 944 (Miss. 1984) (citing Brown v. Credit Center, Inc. 444 So. 2d 358, 363 (Miss. 1983)). MISS. R. CIV. P. 56(c) provides that an interlocutory summary judgment may be rendered solely on the liability issue, although a genuine issue of fact remains as to the amount of damages. Entry of an order for partial summary judgment is interlocutory and thus generally not appealable. Robertson, *supra* note 26, at 16. *See generally* 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.20[3.-1] (1987) [hereinafter MOORE'S FEDERAL PRACTICE]; *see infra* text accompanying notes 261-67.

[31] Brown v. Credit Center, Inc., 444 So. 2d 358, 363 (Miss. 1983).

[32] Pope v. Schroeder, 512 So. 2d 905, 907 (Miss. 1987); *see infra* note 263.

3. What is meant by Rule 56's interchangeability?

A Rule 12(b) motion to dismiss or Rule 12(c) motion for judgment on the pleadings is interchangeable with a Rule 56 motion for summary judgment in the sense that a motion made under one rule may be converted into a motion under the other, depending on whether the trial court must rely on materials extraneous to the pleadings in deciding the motion.[33] *Kountouris v. Varvaris*[34] explains the distinction:

> We regard Rules 12(c) and 56 as interchangeable alternative procedural vehicles. Rule 12(c) provides:
>
> > If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. . . .
>
> Conversely, where a motion for summary judgment is filed and the court determines that it may appropriately be acted upon without reference to matters outside the pleadings, the judgment entered shall be a judgment on the pleadings. Frequently, as here, little turns on whether the motion has been treated as a motion for judgment on the pleadings or a motion for summary judgment.[35]

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[33] *See* Cunningham v. Lanier, 555 So. 2d 685, 685 (Miss. 1989) (trial court treated 12(c) motion as one for summary judgment and sua sponte propounded interrogatories to non-movant); Huff v. Hobgood, 549 So. 2d 951, 953 (Miss. 1989) (12(b)(6) motion treated as one for summary judgment because matters outside pleadings were presented to and considered by trial court); Martin v. Phillips, 514 So. 2d 338, 340 (Miss. 1987) (trial court's asking that all relevant deeds and decrees be admitted into evidence converted 12(b)(6) motion into one for summary judgment); Baugh v. Baugh, 512 So. 2d 1283, 1284 (Miss. 1987) (motion to dismiss converted to one for summary judgment); Walker v. Cleveland Lumber Co., Inc., 512 So. 2d 695, 696 n.2 (Miss. 1987) (motion for summary judgment converted to motion for judgment on the pleadings) (Robertson J., concurring); Millican v. Turner, 503 So. 2d 289, 292 (Miss. 1987) (same); Gray v. Baker, 485 So. 2d 306, 306 (Miss. 1986) (motion to dismiss and motion for summary judgment are interchangeable); Walton v. Bourgeois, 512 So. 2d 698, 699-700 (Miss. 1987) (same).

[34] 476 So. 2d 599 (Miss. 1985).

[35] *Kountouris*, 476 So. 2d at 602 n.3 (citations omitted); *see also* Miss. R. Civ. P. 56 comment.

A too-rapid conversion from a motion to dismiss to a motion for summary judgment, without consideration of its consequences, can lead to problems of inadequate notice to the nonmovant[36] and the lack of a clear record on appeal as to what was considered by the trial court in ruling on the motion for summary judgment.[37]

4. Will counsel be held to understand the Rules' interchangeability?

Counsel will unquestionably be charged with this responsibility. Counsel's argument that at no point in the hearing was he notified the trial court was treating the 12(b) motion as one for summary judgment will fall on deaf ears. In *Walton v. Bourgeois*,[38] the court noted, "Our jurisprudence on this once novel point of procedure is by now quite familiar."[39] Then follows an excellent detailed explanation:

> Anyone who reads the rule is thereby on actual notice that a motion to dismiss has the potential to be treated as a motion for summary judgment if the conditions prescribed in the rule be found. [The plaintiff] and her counsel, of course, are charged with knowledge of the rule's content. Had they read the very portion of Rule 12(b) that they attempt to invoke, they certainly had notice that the motion to dismiss could be treated as a motion for summary judgment.
>
> Whether a Rule 12 motion ought to be converted into a

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[36] *See infra* text accompanying notes 58-66. *Quaere*: Does the 10-day notice requirement of Rule 56(c) apply to a conversion, or will the "reasonable opportunity" requirement of Rule 12(b) and (c) suffice? Walton v. Bourgeois, 512 So. 2d 698, 700 (Miss. 1987), suggests that Rule 12's "reasonable opportunity" requirement, which provides a sliding scale depending on the nature of the issue (purely legal versus inherently factual), is controlling. While our court has still not explicitly addressed this query, *Walton v. Bourgeois* was cited with approval in Cunningham v. Lanier, 555 So.2d 685, 687 (Miss. 1989), where the court reversed the chancellor for abusing his discretion in refusing to provide the non-movant with a reasonable amount of time to oppose a converted motion. In articulating its holding, the court cautioned: "Justice is served when a fair opportunity to oppose a motion is provided—*because consideration of a motion for summary judgment requires a careful review by the trial court of all pertinent evidence in a light most favorable to the nonmovant.*" *Id.*

[37] *See infra* text accompanying notes, 259-60, 277-78.

[38] 512 So. 2d 698 (Miss. 1987).

[39] *Walton*, 512 So. 2d at 700.

> motion for summary judgment is a function of whether the circuit court finds it necessary to resort to matters outside the pleadings in order to dispose of the motion. . . .
>
> Rule 12(b) provides that, upon the motion's being converted to one under Rule 56, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Frequently, this will necessitate a continuance of the hearing on the motion.[40]

5. Are there cases to which Rule 56 does not apply?

The Rule does not apply in a contested probate claim,[41] but it does apply to will contests.[42] According to Rule 81(a),[43] the Mississippi Rules of Civil Procedure have limited applicability in certain actions governed by procedural rules specifically prescribed by statute. In such actions these statutory provisions control to the extent that they conflict with the Rules. The exact contours of Rule 81(a) remain to be fully worked out within the context of summary judgment.

Trial practitioners should likewise be aware of the court's recent enigmatic observation in *Cunningham v. Lanier*,[44] reflecting on which cases are candidates for summary judgment:

> Of course, this is not to say that summary judgment is inappropriate in this case under any circumstances. Summary judgment may be inappropriate in most complex cases—for example, in cases dealing with fraud. Summary judgment may be inappropriate in some not-so-complex cases—for example, in cases dealing with interpretation of an ambiguous contract. However, summary judgment should *never* be considered inappropriate in all cases dealing with a particular matter—for example, in cases dealing with domestic relations or probate claims. Whether summary judgment procedure is an appropriate vehicle for disposition of a particular case is unequivocally

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[40] *Id.* (citations omitted).

[41] Biloxi Regional Medical Center v. Estate of Ross, 546 So. 2d 667, 670-72 (Miss. 1989) (Prather and Robertson, JJ., specially concurring and disagreeing that Rule 56 is inapplicable). *But see infra* notes 44-45.

[42] *In re* Launius, 507 So. 2d 27, 29 (Miss. 1987) (case of first impression as to application of new Rules of Civil Procedure to will contest).

[43] Miss. R. Civ. P. 81(a).

[44] 555 So. 2d 685, 687, n.2 (Miss. 1989) (5-4 decision) (Prather, J.).

a question generally committed to the unfettered discretion of the trial court. This unfettered discretion is restricted only by the substantive aspects of Rule 56 and interpretive case law.[45]

C. *Implementation of the Rule*

1. Where may a motion for summary judgment be filed?

The motion may be filed in all state trial courts: circuit, chancery, or county.[46]

2. Should a chancellor, as the ultimate trier of fact, treat a motion for summary judgment any differently than a circuit court judge?

"Rule 56 means the same and should be construed the same whether the motion for summary judgment is filed in circuit court or chancery court, whether the case is to be heard by a jury or is to be tried to the court without a jury."[47] However, in *McMullan v. Geosouthern Energy Corp.*,[48] the Mississippi Supreme Court warned chancellors to use "great care and caution in granting [summary judgment] when a hearing on the merits can, in all likelihood, be heard as expeditiously . . . ."[49]

3. Which parties can file for summary judgment?

The procedure is available to the plaintiff under Rule 56(a), and to the defendant or any other party to a civil action under Rule 56(b), with the obvious result that cross-motions are available.[50]

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[45] *Id.* (citations omitted); *see infra* notes 230-38 and accompanying text.

[46] *Order*, 395 So. 2d 1 (1981); *see Robertson*, *supra* note 26, at 14.

[47] Dennis v. Searle, 457 So. 2d 941, 944 (Miss. 1984) (citations omitted).

[48] 556 So. 2d 1033 (Miss. 1990).

[49] *Id.* at 1036. The court noted that "the summary judgment 'short-cut' would still prove to be the longest route." *Id.* In dictum the Fifth Circuit has suggested that in a non-jury case the trial court may resolve disputed issues of fact, at least where a trial would not enhance the court's ability to draw inferences and conclusions. Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 273-74 n.15 (5th Cir.) (summary judgment for plaintiff affirmed enforcing contract and rejecting defense of mutual mistake), *cert. denied*, 484 U.S. 851 (1987).

[50] *See, e.g.*, Hopton Bldg. Maintenance, Inc. v. United Parcel Serv., Inc., No. 07-CA-

4. When can the movant[51] file for summary judgment?

The defending party[52] may file for summary judgment at any time.[53] The claimant[54] must wait at least thirty days from commencement of the action or may file at any time after service of a motion for summary judgment by an adverse party.[55]

5. Must a motion for summary judgment be in writing?

It is not mandatory that the motion be in writing. If made during a hearing or trial under Rule 7(b)(1), it can be made orally; but the non-movant may object for lack of adequate notice.[56] If the non-movant objects and prejudice is shown, any grant of the oral motion will likely be reversed.[57] Accordingly, oral motions should be used sparingly.

59086, slip op. at 3 (Miss. March 14, 1990) (cross-motions for summary judgment on cross-claim for indemnity); Pursue Energy Corp. v. Perkins, No. 07-CA-58744, slip op. at 3 (Miss. Feb. 28, 1990) (cross-motions in contract suit); Newman v. Newman, No. 07-CA-58851, slip op. at 2 (Miss. Feb. 21, 1990); Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58619, slip op. at 3 (Miss. Oct. 4, 1989); *In re* Estate of Smiley, 530 So. 2d 18, 20 (Miss. 1988); *see also infra* text accompanying notes 88-90.

[51] The two actors in the drama are the *movant* (the party who files the motion for summary judgment) and the *non-movant* (the party opposing the motion for summary judgment).

[52] "A party against whom a claim, counterclaim, or cross-claim is asserted or declaratory judgment is sought." MISS. R. CIV. P. 56(b).

[53] *Id.* Caveat: Since a motion for summary judgment is not a responsive pleading within the meaning of MISS. R. CIV. P. 15, the non-movant plaintiff can amend his complaint without leave of court in response to the motion for summary judgment if the motion is filed before the movant defendant files his responsive pleading. 3 MOORE'S FEDERAL PRACTICE, *supra* note 30, ¶ 15.07[2]. *See generally* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 1480. *See infra* notes 180-82 and accompanying text.

[54] "A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment . . . ." MISS. R. CIV. P. 56(a).

[55] *Id.* The Comment notes, "A Rule 56 motion always may be made by a defendant before answering and under certain circumstances may be made by a plaintiff before the responsive pleading is interposed." *Id.* comment.

[56] Walker v. Cleveland Lumber Co., 512 So. 2d 696, 696 n.1 (Miss. 1987) (Robertson, J., concurring).

[57] Pope v. Schroeder, 512 So. 2d 905, 907-08 (Miss. 1987) (one co-defendant orally joined another co-defendant's motion for summary judgment).

6. How much notice must the movant give, whether the motion is oral or written?

The motion "shall" be served at least ten days before the hearing date.[58] However, Rule 6(e) adds three days if the motion for summary judgment (or notice of the motion) is mailed.[59] Rule 56 seems literally to require an actual hearing.[60]

7. Will the court nevertheless permit "gun jumping"?

Under limited circumstances, "gun jumping" is permitted. Accordingly, the Mississippi Supreme Court has found a mere "technical violation" where the circuit court heard a summary judgment motion within the ten-day notice period but delayed its ruling on the motion until after discovery was completed.[61] Likewise, in *In re Launius*,[62] although the court voiced concern over "apparent disregard for the rules,"[63] it concluded that the entry of summary judgment in favor of all movants where one of several movants had filed with only five days notice (but all other movants had met the ten-day requisite) was a "purely procedural technicality" amounting to harmless error.[64] The "gun jumper" should bear in mind, however, that he may easily shoot himself in the foot. The court has admonished that the ten-day period is a procedural safeguard, not a "mere extension of our

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[58] MISS. R. CIV. P. 56(c). "Ordinarily, a motion . . . for summary judgment will be in writing . . . . [T]he Circuit Court appears to have heard and considered the [oral] motion prematurely, for it had not been made ten days before the hearing." Pope v. Schroeder, 512 So. 2d 905, 907-08 (1987); Walker v. Cleveland Lumber Co., 512 So. 2d 695, 696 n.1 (Miss. 1987) (Robertson, J., concurring).

[59] *See* Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640, 644 (Miss. 1987).

[60] The federal district courts, often ruling without a hearing, treat the rule as requiring 10 days notice before a summary judgment can be granted. *See* Pope v. Schroeder, 512 So. 2d 905, 907-09 (1987). Of course, the briefing schedule provided by Rule 8(d), Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi, also comes into play.

[61] Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640, 644-45 (Miss. 1987) (eight days was "technical violation" where motion was heard before but not decided until after discovery was completed).

[62] 507 So. 2d 27 (Miss. 1987).

[63] *Launius*, 507 So. 2d at 32.

[64] *Id.*

liberal procedure exalting substance over form,"[65] which should be enforced in all but the extraordinary cases in which ten days notice is impractical and only when it is absolutely clear that the non-movant has suffered no prejudice.[66]

D. The Basic Theory Underlying Summary Judgment

1. What element of the non-movant's case does a motion for summary judgment test?

A motion for summary judgment tests the legal sufficiency of the non-movant's case.[67] It is in a sense the functional equivalent of a request for a directed verdict or peremptory instruction, but it occurs earlier in the life of a civil action.[68]

2. What is the movant's burden on a motion for summary judgment?

Essentially, the movant must establish all of the requisites of the demand for summary judgment under Rule 56(c). On each element of a claim or defense, the movant must show: (1) that there is no genuine issue of material fact *and* (2) that he is entitled to judgment as a matter of law.[69] The easy case for the mo-

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[65] Pope v. Schroeder, 512 So. 2d 905, 908 (Miss. 1987).

[66] *Id.*; *see supra* note 36.

[67] Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 6 (Miss. Dec. 20, 1989); The Meridian Star, Inc. v. Williams, 549 So. 2d 1332, 1336 (1989).

[68] Sanford v. Federated Guar. Ins. Co., 522 So. 2d 214, 217 (Miss. 1988); Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 415 (Miss. 1988); Mississippi Moving & Storage Co. v. Western Elec. Co., 498 So. 2d 340, 342 (Miss. 1986); Willis v. Mississippi Farm Bureau Mut. Ins. Co., 481 So. 2d 256, 258 (Miss. 1985); Brown v. Credit Center, Inc., 444 So. 2d 358, 362 (Miss. 1984); *see* MISS. R. CIV. P. 56 comment. There is one difference between a summary judgment on the one hand and the request for directed verdict or peremptory instruction on the other which has apparently not yet been treated by the Mississippi Supreme Court: on a motion for summary judgment the trial court cannot factor "credibility" into the equation. *See generally* FEDERAL PRACTICE AND PROCEDURE, supra note 1, § 2713.1, at 614 (with issue of credibility of affiant's or deponent's testimony at trial, court must deny summary judgment and leave question to be resolved by finder of fact). However, "a directed verdict motion typically would be made after the witness had testified, and the court could take account of the possibility that he could not be disbelieved or believed by the jury." *Id.*; *cf.* Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); *see infra* text accompanying notes 310-11.

[69] Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725, 727 (Miss. 1989);

vant is where, regardless of the facts, there is simply no cognizable claim as a matter of law.[70] The closer question arises on the first prong—that is, whether there is any genuine issue of material fact which would preclude granting a summary judgment and instead require a plenary trial on the merits.

3. Is this a burden of proof the movant must meet?

No, it is rather a burden of production and persuasion to convince the trial court on two points: (1) there is no genuine issue of material fact raised by the evidentiary predicate for the motion; and (2) on the basis of this evidentiary predicate, the movant is entitled to summary judgment as a matter of law.[71] It

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Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988); Blackmon v. Payne, 510 So. 2d 483, 489 (Miss. 1987); Pargo v. Electric Furnace Co., 498 So. 2d 833, 835-36 (Miss. 1986); Smith v. Sanders, 485 So. 2d 1051, 1054 (Miss. 1986); Gray v. Baker, 485 So. 2d 306, 308 (Miss. 1986); Brown v. Credit Center, Inc., 444 So. 2d 358, 362-63 (Miss. 1983).

The rule straightforwardly states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

MISS. R. CIV. P. 56(c). This broad generalization must be analyzed in light of which party bears the ultimate burden of proof at trial on a given issue. *See infra* text accompanying notes 72-83.

[70] *See, e.g.*, Hill v. Smith, No. 07-CA-58992, slip op. at 5 (Miss. Mar. 14, 1990) (affirming summary dismissal due to lack of standing because grandparents had no common-law "right" of visitation with their grandchildren or statutory right under circumstances presented); Carpenter v. Stop-N-Go Mkts., Inc., 512 So. 2d 708, 709 (Miss. 1987). In this case of first impression, the court held as matter of law that no duty was owed by a convenience store owner to persons inside the store to erect barriers in order to prevent vehicles from driving through the store's plate class window. *Id.*; *see also* Riley Bldg. Supplies, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 508 (Miss. 1987) (finding "outcome determinative question . . . one of law" and rejecting any duty on lender to exercise reasonable diligence to assure payment of loan proceeds and advances by materialmen and subcontractors under stipulated facts); Shattuck v. Estate of Tyson, 508 So. 2d 1077, 1080 (Miss. 1987) (wife's right to renounce her husband's will was personal to wife and abated after death); Southern Farm Bureau Casualty Ins. Co. v. Brewer, 507 So. 2d 369 (Miss. 1987) (construing physical contact requirement under uninsured motorist provision).

[71] Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988); Blackmon v. Payne, 510 So. 2d 483, 489 (Miss. 1987); Brown v. McQuinn, 501 So. 2d 1093, 1095 (Miss. 1986); Pargo v. Electric Furnace Co., 498 So. 2d 833, 835-36 (Miss. 1986); Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985).

Quaere: Can Fruchter v. Lynch Oil Co., 522 So. 2d 195 (Miss. 1988), be read as not requiring the movant to produce any evidentiary predicate on an issue as to which the

is implicit in the cases that the movant at all times bears this ultimate burden of persuasion. The movant is helped considerably by what may be viewed as a shift in the burden of production on claims or issues as to which the non-movant bears the burden of proof at trial, as discussed immediately below.

4. On what elements of the case does the movant bear this burden of production?

The burden is only on those elements as to which he will ultimately bear the burden of proof at trial. *Fruchter v. Lynch Oil Co.*[72] makes the point clear:

> The burden of producing evidence in support of or in opposition to a motion for summary judgment is a function of our rules regarding the burden of proof at trial on the issue in question.
>
> Our pre-*Galloway* cases have recognized that Rule 56 does not cast upon the movant any burden beyond that which he would shoulder at trial. What we say is that the movant has the job of persuading the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established he is entitled to judgment as a matter of law.
>
> We have referred to the movant's burden as one of production and of persuasion, not of proof. *Celotex* and *Galloway* make clear that this latter point is in need of refinement. *The movant has the burden of production only where at trial the movant would have the burden of proof.*
>
> In today's case Fruchter at trial would have the burden of proving facts sufficient to establish Lynch Oil's responsibility for Leeton's negligence. She therefore had the burden of production of evidence showing a genuine issue of material fact at the summary judgment hearing. She had the burden of producing evidence which, if believed, would establish Lynch Oil's control of, or right to control, Leeton's work.
>
> This is wholly consistent with our oft-stated premise that the party against whom a motion for summary judgment has been made must respond with diligence. She remained silent at

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non-movant bears the burden of proof at trial? *See infra* text accompanying notes 72-87, 91-97.

[72] 522 So. 2d 195 (Miss. 1988).

her peril.[73]

Implicit in *Fruchter*'s reliance on *Celotex*, although not apparently yet expressly articulated by the Mississippi Supreme Court, is the requirement that the movant make an initial " 'showing'—that is, pointing out . . . that there is an absence of evidence to support the non-moving party's case."[74] This requirement is probably best practically viewed as an initial burden of production of evidence (or procedural burden emanating from the language of Rule 56 itself) which then shifts the burden of production of evidence to establish a material issue of fact to the non-movant on issues or claims as to which the non-movant will bear the ultimate burden of proof at trial.[75] If the non-movant fails to sustain his burden of production, the movant will perforce have persuaded the trial court that there is no genuine issue of material fact.[76] *Fruchter* can certainly be read literally to remove completely from the movant any burden of production on issues as to which the non-movant bears the burden of proof at trial.[77]

5. Is there a trap for the unwary movant here?

There may be an unsuspected pitfall. It is not always easy to tell where the movant's burden to establish the elements of his case ends and the non-movant's burden to produce evidence on issues where he will have the burden of proof at trial begins. In *Smith v. City of West Point*,[78] a homeowner brought a negligence action against a municipality in which he alleged the municipality was vicariously liable for a police officer's negligence.[79] The officer chased a fleeing misdemeanant whose automobile ul-

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[73] *Fruchter*, 522 So. 2d at 198 (emphasis added) (citations omitted).

[74] Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); *see infra* note 311.

[75] *See* Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 6 (Miss. Dec. 20, 1989); *see also infra* notes 91-97 and accompanying text.

[76] *See infra* text accompanying notes 192-94.

[77] *Cf.* Tucker v. Hinds County, No. 07-CA-59298, slip op. at 5 (Miss. Mar. 21, 1990) ("[t]he burden of demonstrating that no genuine issue of fact exists is on the moving party"). *Quaere*: Is "demonstrating" the equivalent of *Celotex's* "showing"?

[78] 475 So. 2d 816 (Miss. 1985).

[79] *Smith*, 475 So. 2d at 818.

timately struck and damaged the homeowner's residence.[80] The court reversed summary judgment in favor of the defendant for failure to carry its burden:

> The affidavits Defendants have filed fail to pierce Plaintiff's claim. That the officer pursued an escaping misdemeanor suspect who in turn crashed into Plaintiff's residence or other cognizable evidence has been admitted. No affidavit has been furnished by the City denying the officer's excessive speed or negligence, such as would have made it incumbent upon Plaintiff that she file counter-affidavits supporting her allegations.[81]

The two-step dance envisioned by this shifting of the burden of production on a motion for summary judgment is not one of complete mathematical certainty. The pattern may get ragged around the edges. In light of the court's subsequent decision in *Fruchter*,[82] which adopted the rationale of *Celotex Corp. v. Catrett*,[83] there is some question as to the continuing validity of *Smith v. City of West Point*, but it does point out the not-always-easy distinction as to where the burden of production will be found by the appellate court to fall.

6. Can the movant rely on the defects or weaknesses of the non-movant's case?

The movant cannot rely on the inadequacy of the opposition; rather his case must stand on its own strength. He must demonstrate that: (1) there is no material issue of fact, and (2) he is entitled to summary judgment as a matter of law.[84]

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[80] *Id.* at 817.

[81] *Id.* at 818.

[82] 522 So. 2d 195 (Miss. 1988).

[83] 477 U.S. 317 (1986).

[84] *See, e.g.*, Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 7 (Miss. Dec. 20, 1989); Smith v. H.C. Bailey Cos., 477 So. 2d 224, 233 (Miss. 1985) (quoting Jackson v. Mississippi, 644 F.2d 1142, 1144 (5th Cir. 1981) in stating that "movant must establish the propriety of relief by the strengths of his own showing, not by the defects in his opponent's showing"); Robertson, *supra* note 26, at 14-15. Caveat: The force of this oft-repeated rubric has been diminished, at least to a degree, by the "nuance" of Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988), which casts on the non-movant a burden of production on issues as to which the non-movant will bear the burden of proof at trial. *See infra* text accompanying notes 187-88. Clearly this "nuance" has raised a few more as-yet-unironed wrinkles in the construction of Rule 56.

7. Must the movant, in effect, prove a negative pregnant?

Our court has adopted the persuasive reasoning of *Celotex Corp. v. Catrett*,[85] which flatly rejects this notion. In *Millican v. Turner*,[86] the Mississippi Supreme Court observed:

> We do not imply that Millican, to the extent that his summary judgment motion encompassed Turner's affirmative defense, was required to submit affidavits showing the absence of any genuine issue of material fact.[87]

8. Is the movant's burden negated or alleviated if the non-movant simultaneously moves for summary judgment?

No, where cross-motions are filed, each must be judged and tested separately under the strictures of Rule 56.[88] As the court in *Brown* observed:

> Another word of caution. . . . The fact that cross-motions for summary judgment have been filed, however, does not without more empower the court to dispense with trial and enter judgment summarily. Construing comparable Federal Rule 56, the United States Court of Appeals for the Third Circuit in *Rains v. Cascade Industries, Inc.*, . . . explained:
>
> > Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by a plenary trial and not on summary judgment. The same may be said of our summary judgment procedure.[89]

Without such a ruling, and with it understood that the

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[85] 477 U.S. 317 (1986).

[86] 503 So. 2d 289 (Miss. 1987).

[87] *Millican*, 503 So. 2d at 292 n.3. Again, *quaere*: Exactly what does the movant have to show on issues as to which he does not bear the burden of proof?

[88] Bush v. Mullen, 478 So. 2d 313, 315 (Miss. 1985); Brown v. Credit Center, Inc., 444 So. 2d 358, 363 (Miss. 1983).

[89] *Brown*, 444 So. 2d at 363 (quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (1968)).

court must construe the evidentiary material most favorably for the non-movant, one could theoretically postulate the mutually disappearing gingham dog and calico cat.[90]

E. Proper Filing by the Movant

1. How does the movant file for summary judgment?

The movant should file a written motion with appropriate evidentiary support. The necessary support has been well described:

> A party moving for summary judgment must support his motion, but the rule gives him considerable flexibility as to how that support must be furnished. The rule says the motion may be made "with or without supporting affidavits." Generally, the motion will be—as it ought to be—supported by affidavits or by discovery materials, such as depositions, answers to interrogatories, Rule 36 admissions, and the like.[91]

Justice Robertson carefully uses the word "generally" because, under *Celotex*, as adopted by the Mississippi Supreme Court in *Fruchter* and other cases, the movant has no duty to provide an evidentiary predicate to negate the existence of a material fact as to those issues on which he does not bear the burden of proof at trial.[92] Rather, as to issues where the movant does not bear the burden of proof at trial, he must initially only make a sufficient "informing," "pointing out," or "showing" that there is an absence of evidence to support the non-movant's case.[93] In *Celotex* Justice Rehnquist explains that this eviden-

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[90] *See generally* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2720, at 20-21 (legal theories movant advances in support of his motion and his assertion that there is no issue of material fact cannot be used against him when trial court rules on his adversary's cross-motion, and vice versa); *see infra* notes 219-22.

[91] Robertson, *supra* note 26, at 14.

[92] *See supra* notes 72-83, 85-87 and accompanying text.

[93] *Celotex*, 477 U.S. at 325. The theoretical Catch-22 is whether the movant needs any evidence to complete his mission of pointing out the absence of evidence to support the non-movant's case. From a practical point of view, the movant will usually point to the paucity of the record with pride on issues as to which he does not bear the burden of proof at trial. This theoretical puzzle becomes more significant when one considers that appellate review of summary judgment is de novo. The movant will often prefer to be a minimalist and not a portrait painter since the appellate court may "see" genuine issues

tiary support need be only minimal (if not nonexistent) in such a circumstance:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. . . .
>
> Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to motion for summary judgment "made and supported as provided in this rule." According to Respondent's argument, since Petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) thereby requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories and admissions on file" designate "specific facts showing that there is a genuine issue for trial."
>
> . . . .
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> But we do not think that the *Adickes* [*v. S.H. Kress & Co.*] language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained,

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of fact not seen by the trial court. *See infra* text accompanying notes 268-70.

> the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party's case.[94]

The magic *Celotex* buzzwords are the "informing," "showing," or "pointing out" by the movant of the absence of evidence to support the non-movant's case. Just how little "informing," "showing," and "pointing out" need be made is unclear. An instructive case is *Atkinson v. National Bank of Commerce*,[95] in which the non-movant essentially sought to raise two affirmative defenses on appeal.[96] Finding that the effort of counsel for the non-movant to raise these issues was untimely, our court held as follows:

> On both of these issues—the Rule 13(a) procedural claim and the volunteer claim—the Atkinsons are asserting claims in bar. These are in the nature of affirmative defenses. As such the Atkinsons had the burden of proof at trial. In our present summary judgment posture, the Atkinsons *bore the risk of the inadequacies of the record.*
>
> . . . .
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> . . . The Atkinsons have placed in the record nothing in form or substance which would empower the court, consistent with Rule 56, Miss. R. Civ. P., to hold that on the "volunteer/

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[94] *Celotex*, 477 U.S. at 323-25. Justice Brennan's dissent discusses the two components of establishing the nonexistence of a genuine fact: (1) an initial burden of production which shifts to the non-moving party if satisfied by the moving party, and (2) an ultimate burden of persuasion which always remains on the moving party. *Id.* at 329-37 (Brennan, J., dissenting). He notes that the court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the court finds that the moving party has discharged its initial burden of production. *Id.* at 332. As yet, the Mississippi Supreme Court has not approached the analysis in precisely this fashion. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2727, at 143-44 (if movant makes "prima facie" case by meeting his initial burden of production of evidence, burden of production shifts to non-movant). Justice Brennan saw no difference between himself and the majority in the principles to be applied. He viewed the disagreement as to what was sufficient for the movant to carry his initial burden of production.

The movant's burden may be analyzed as a procedural one under Rule 56 to distinguish it from a substantive evidentiary burden borne at trial. However it is viewed, some triggering is required by the movant to compel the non-movant to produce his evidence showing there is a genuine issue of material fact.

[95] 530 So. 2d 163 (Miss. 1988).

[96] *Atkinson*, 530 So. 2d at 166.

> give" defense there was an issue for trial. . . .
>
> As a matter of law the Atkinsons' *showing* on each of these defenses is insufficient to establish a genuine issue of material fact which would avoid summary judgment.[97]

There are obvious practical difficulties in deciding how much evidentiary predicate, if any, the movant need make with respect to issues on which the non-movant will bear the burden of proof at trial. Presently the point of balance between the movant's carrying the burden of ultimate persuasion of entitlement to summary judgment as opposed to the non-movant's carrying the burden of production with respect to issues on which he bears the burden of proof at trial is not fully defined. Mississippi law will bear watching as this balancing point continues to be struck in the cases. A practical analysis seems to be to view it as a shifting of the burden of production.

2. What is the appropriate evidentiary support?

It can be any form of admissible evidence,[98] including but not limited to:

(1) Affidavits,[99] if sworn, based on personal knowledge, and showing affirmatively that the affiant is competent to testify to the matters stated therein;[100]

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[97] *Id.* at 166-67 (emphasis added).

[98] The Comment refers to it variously as "outside material," "outside evidence," and "other forms of evidence"—terms which have not gained wide currency with the Mississippi Supreme Court, but which neatly capsule the required evidentiary predicate's broad scope. *See* Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 4 (Miss. Jan. 31, 1990) (court addressed "forms of evidence which may be presented at a summary judgment hearing"). *See generally* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2721, at 559.

Technically read, Rule 56(c) includes as outside matter, outside evidence, or other evidence only "pleadings, depositions, answers to interrogatories . . . admissions on file, together with the affidavits." *Id.* The Comment and courts routinely interpret it as meaning any form of admissible evidence. Although not yet considered by the Mississippi Supreme Court, it could include, for example, judicial notice or admissions in briefs in addition to the items of evidence already recognized by our court. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2723.

[99] Contrary to some popular belief, supporting affidavits are not required. Any evidentiary material, with or without a supporting affidavit, is permissible. MISS. R. CIV. P. 56(c).

[100] MISS. R. CIV. P. 56(e); *see, e.g.*, Magee v. Transcontinental Gas Pipe Line, 551 So.

(2) Depositions;[101]
(3) Sworn answers to interrogatories;[102]
(4) Admissions via Rule 36 and/or in pleadings;[103]
(5) Pleadings;[104]

2d 182, 186 (Miss. 1989) (affidavit is sufficient evidence to support or oppose motion for summary judgment); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195 (Miss. 1989); Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1323 (Miss. 1989); Walker v. Skiwski, 529 So. 2d 184, 186 (Miss. 1988); Phillips v. Hull, 516 So. 2d 488, 490 (Miss. 1987); Walker v. Cleveland Lumber Co., 512 So. 2d 695, 696 (Miss. 1987); Terrell v. Rankin, 511 So. 2d 126, 129 (Miss. 1987); Blackmon v. Payne, 510 So. 2d 483, 489 (Miss. 1987); Lester Eng'g v. Richland Water & Sewer Dist., 504 So. 2d 1185, 1187 (Miss. 1987); New Orleans Great N. Ry. v. Hathorn, 503 So. 2d 1201, 1201 (Miss. 1987); Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987); Dennis v. Searle, 457 So. 2d 941, 943 (Miss. 1984).

Once these three hurdles have been cleared, it is axiomatic that the facts contained therein must be admissible. Miss. R. Civ. P. 56(c); *see infra* text accompanying note 114.

[101] Magee v. Transcontinental Gas Pipe Line, 551 So. 2d 183, 186 (Miss. 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195 (Miss. 1989); Walker v. Skiwski, 529 So. 2d 184, 186 (Miss. 1988); Phillips v. Hull, 516 So. 2d 488, 490 (Miss. 1987); Blackmon v. Payne, 510 So. 2d 483, 489 (Miss. 1987); Dennis v. Searle, 457 So. 2d 941, 943 (Miss. 1984). As with affidavits, it must be established that the deponent's testimony is sworn and based upon personal knowledge and that he is competent to testify. *See infra* text accompanying note 165.

[102] Magee v. Transcontinental Gas Pipe Line, 551 So. 2d 182, 186 (Miss. 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195 (Miss. 1989); Walker v. Skiwski, 529 So. 2d 184, 186 (Miss. 1989); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 682 (Miss. 1987); Baugh v. Baugh, 512 So. 2d 1283, 1286 (Miss. 1987). As with affidavits and depositions, answers to interrogatories must be sworn and based upon personal knowledge; and the answering party must be competent to testify. *See infra* text accompanying note 165.

[103] *See, e.g.*, Sawyer v. Hannan, 556 So.2d 696, 697 (Miss. 1990) (Rule 36 admissions); Magee v. Transcontinental Gas Pipe Line, 551 So. 2d 182, 186 (Miss. 1989) (same); Walker v. Skiwski, 529 So. 2d 184, 186 (Miss. 1988) (same); Phillips v. Hull, 516 So. 2d 488, 490 (Miss. 1987); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 682 (Miss. 1987); Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987); Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 623 (Miss. 1986); Smith v. First Fed. Sav. & Loan Ass'n, 460 So. 2d 786, 792 (Miss. 1984); Dennis v. Searle, 457 So. 2d 941, 943 (Miss. 1984) (admissions made in answer).

Generally, admissions in pleadings will be contained in responsive pleadings; however, the language of Rule 56(c) itself surely permits the movant to utilize allegations contained in the non-movant's pleadings which the movant does not deny as a basis for the motion for summary judgment.

[104] *See, e.g.*, Magee v. Transcontinental Gas Pipe Line, 551 So. 2d 182, 186 (Miss. 1989); Phillips v. Hull, 516 So. 2d 488, 490 (Miss. 1987); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 682 (Miss. 1987); New Orleans Great N. Ry. v. Hathorn, 502 So. 2d 1201, 1202 (Miss. 1987); Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987); Dennis v. Searle, 457 So. 2d 941, 943 (Miss. 1984) (sworn complaint). The non-movant's unsworn pleading has no "power to generate a genuine issue of fact." Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 186 (Miss.

(6) Sworn testimony at the summary judgment hearing;[105]

(7) Documents placed into evidence by parties as required by the court;[106]

(8) Stipulations and agreed uncontested issues of fact in pretrial orders;[107]

(9) Stipulations;[108]

(10) Admissions made at oral argument;[109] and

(11) Transcribed testimony from a prior action, which, if properly certified under Rule 56(e), is treated the same as any other affidavit.[110]

3. Must the evidentiary support underlying a motion for summary judgment be in a form admissible at trial?

Being in a form which is admissible at trial is not a prerequisite under Rule 56; however, the substantive evidence must be admissible at trial.

We do not mean that the nonmoving party must produce evi-

1989). Likewise, "[t]he party against whom a motion for summary judgment has been made must respond with diligence. He remains silent at his peril. For one thing, he may not rest upon allegations or denials of his pleadings." Robertson, *supra* note 26, at 15. Of course, any admission in a responsive pleading may be used by an adverse party, regardless of whether the pleading is sworn or not. *See supra* note 103, *infra* notes 166-67 and accompanying text.

[105] Davis v. Davis, 508 So. 2d 1062, 1066 (Miss. 1987); Cole v. Wiggins, 487 So. 2d 203, 206 (Miss. 1986); *see* Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 4-7 (Miss. Jan. 31, 1990) (in 5-4 decision, court reversed trial court for abusing its discretion in denying non-movant right to present live testimony at summary judgment hearing).

[106] Martin v. Phillips, 514 So. 2d 338, 340 (Miss. 1987); Modling v. Bailey Homes & Ins., 490 So. 2d 887, 891 (Miss. 1986).

[107] Galloway v. Travelers Ins. Co., 515 So. 2d 678, 682 (Miss. 1987).

[108] Walker v. Skiwski, 529 So. 2d 184, 186 (Miss. 1988); *see In re* Estate of Smiley, 530 So. 2d 18, 26 (Miss. 1988) (stipulation would have been sufficient evidence to oppose or support motion for summary judgment); Riley Bldg. Supplies, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 508 (Miss. 1987); Thomas v. Munson Mach. Co., 463 So. 2d 1044, 1047 (Miss. 1985).

[109] *In re* Launius, 507 So. 2d 27, 31 (Miss. 1987); Modling v. Bailey Homes & Ins., 490 So. 2d 887, 889 (Miss. 1986).

[110] Atkinson v. National Bank of Commerce, 530 So. 2d 163, 166 (Miss. 1988) (certified copy of prior proceedings is necessary; affidavit from counsel regarding testimony at prior trial is inadequate); *In re* Estate of Smiley, 530 So. 2d 18, 25-26 (Miss. 1988). Needless to say, such constructive affidavits must meet the requirements otherwise applicable to affidavits under Rule 56. *See supra* notes 99-100 and accompanying text.

> dence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.[111]

The Court is apparently saying that while the form in which the evidence is presented need not be admissible at trial—an affidavit, for example—the substantive evidence itself will have to meet trial admissibility standards. Accordingly, such evidence cannot be hearsay or evidence offered by an incompetent witness.[112]

4. Is a supporting affidavit necessary?

No, a supporting affidavit is not the sine qua non of a motion for summary judgment. Any evidentiary material is permissible.[113]

5. If a supporting affidavit is used, how should it be drawn?

Rule 56(e) requires that supporting affidavits be made on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify to the matters stated therein.[114] Moreover, Rule 56(e) requires that

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[111] Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). This same rule not requiring an admissible form of evidence to support the motion would, of course, apply to the mirror image of opposing it. *See infra* text accompanying notes 157-59.

[112] *See* Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 6 (Miss. Jan. 31, 1990) ("Policy behind Rule 56(e) . . . is to consider any evidence at a summary judgment hearing that would be admissible at trial"). *See generally* 6 MOORE'S FEDERAL PRACTICE, *supra* note 30, ¶ 56.22 (discussion of admissibility requirements for summary judgment); FEDERAL PRACTICE & PROCEDURE, *supra* note 1, ¶ 27.38 (same).

[113] MISS. R. CIV. P. 56(c). A supporting affidavit itself may inadvertently raise a genuine issue of material fact. Brocato v. Mississippi Publishers Corp., 503 So. 2d 241, 244 (Miss. 1987) (silence in supporting affidavit as to date of postmark evidencing mailing for application of 10 days notice under MISS. CODE ANN. § 95-1-5 (1972) raised genuine issue of material fact on face of affidavit); *see* Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 622 (Miss. 1986) (instructive example of how not to draw affidavits).

[114] *See* Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1323 (Miss. 1989)

"sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."[115] *Walker v. Skiwski*[116] contains an instructive discussion of how affidavits should be drawn. In this medical malpractice case, the court criticized the affidavits as follows:

> The affidavit from Dr. Gates, as well as that from Dr. Vacarella, contained the lawyer's touch to the end. First, though physicians often speak in different tongues, we have never heard one use "said" as an adjective instead of a verb. Moreover, each affidavit offers the opinion that the lawsuit the Walkers have filed against Skiwski is "frivolous." Such special pleading is itself frivolous and quite unhelpful to the Court.
>
> There is one aspect to the three affidavits furnished by defense counsel which is less than satisfactory. The language, in terms of the affidavits, [is] almost wholly conclusory. [The affidavits] give ultimate opinions with very little in the way of facts and specifics in support. To the point, each of the defense affidavits states that the affiant was familiar with the standard of medical care and treatment regarding circumcision and that Skiwski conformed thereto. No clue is given us regarding the details and contents of that standard of care. For the moment it is sufficient to point out that such affidavits of the sort found on behalf of Drs. Vacarella, Gates, and Skiwski would be far more useful to the Court if they provided facts and details rather than sweeping conclusions.[117]

("sworn allegations based on firsthand knowledge"); Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 186 (Miss. 1989); Walker v. Skiwski, 529 So. 2d 184, 186 (Miss. 1988); Phillips v. Hull, 516 So. 2d 488, 491 (Miss. 1987); Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 622 (Miss. 1986); Pearl River County Bd. of Supervisors v. South E. Collections Agency, Inc., 459 So. 2d 783, 785 (Miss. 1984). While the Mississippi Supreme Court apparently has not yet addressed the issue, it appears evident that the trial court should utilize MISS. R. EVID. 104(a) in determining whether a proffered affiant may give an expert opinion pursuant to MISS. R. EVID. 702. *Quaere*: Is this qualification analysis required to determine whether the affiant is "competent to testify" pursuant to Rule 56(e)? Will the trial court be reversed only for an abuse of discretion, or will the appellate court conduct a de novo review?

[115] MISS. R. CIV. P. 56(e); *see* Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 622 (Miss. 1986). *See generally* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2722, at 57.

[116] 529 So. 2d 184 (Miss. 1988).

[117] *Skiwski*, 529 So.2d at 186 nn.1 & 2.

Evenhandedly, our court has likewise criticized non-movants' poorly drawn affidavits which either did not specifically raise a genuine issue of material fact[118] or failed to raise a sufficient "level of factual disputes" (bringing forward "significant probative evidence") to justify denial of summary judmgent.[119] Our court's message is clear: affidavits should contain detailed facts specifically aimed at a genuine issue of material fact, not mere generalized conclusions.

6. What happens to the motion in the absence of appropriate evidentiary support?

Generally, an unsupported motion will not be sustained.[120] As to issues on which the movant does not bear the ultimate burden of proof at trial, the exact quantum of evidentiary support that is necessary is presently unclear.[121]

7. If the motion for summary judgment is denied, is the movant foreclosed from the opportunity to refile it?

Under certain circumstances the movant can move again. For example, the movant may be permitted to file again if his motion was initially denied because of inadequate factual development.[122] Even if the grant of summary judgment is reversed on appeal, the movant is not necessarily precluded from seeking summary judgment again on the same issue.[123] On the other hand, after a summary judgment has been rendered against the non-movant, he may not amend as a matter of right to avoid the summary judgment.[124] Of course, once summary judgment is fi-

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[118] Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 623 (Miss. 1986).

[119] Newell v. Hinton, 556 So.2d 1037, 1043 (Miss. 1990); *see infra* notes 160-62 and accompanying text.

[120] Ratliff v. Ratliff, 500 So. 2d 981, 981 (Miss. 1986); *see infra* notes 160-62 and accompanying text.

[121] *See supra* text accompanying notes 91-97. *Quaere*: Would the movant's simply pointing out there was no evidence to raise a genuine issue of material fact suffice?

[122] *In re* Estate of Smiley, 530 So. 2d 18, 26 (Miss. 1988).

[123] *Id.*; *see also* Newman v. Newman, No. 07-CA-58851, slip op. at 10 n.2 (Miss. Feb. 21, 1990).

[124] *See* MISS. R. CIV. P. 56 comment. *See generally* 6 MOORE'S FEDERAL PRACTICE, *supra* note 30, ¶ 56.10, at 56-57; *infra* notes 180-82 and accompanying text.

nal, it constitutes a judgment on the merits with full res judicata effect.[125]

F. Opposition by the Non-Movant

1. What must the non-movant do in opposing a motion for summary judgment?

The non-movant must respond with diligence to demonstrate the existence of a genuine issue of material fact and/or that the movant is not entitled to judgment as a matter of law. He remains silent at his peril. He must by affidavit or other appropriate evidentiary predicate set forth specific facts showing that there are indeed genuine issues for trial.[126] "The burden on the non-moving party is not a heavy one; he simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial or that, even though there is no genuine issue of material fact, the movant is not entitled to judgment as a matter of law."[127]

The Mississippi Supreme Court uses at times a general shorthand rubric to define the required material issue of fact. According to the lexicon of the court, it has been variously denominated a "jury question,"[128] a "triable issue of material fact,"[129] "unresolved issues of fact,"[130] "significant probative evi-

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[125] Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1196 (Miss. 1989). "A summary judgment goes to the merits of the case, and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata." MISS. R. CIV. P. 56 comment.

[126] Raines v. Spruill, No. 07-CA-58860, slip op. at 7 (Miss. Mar. 14, 1990) ("failed to produce any evidence that raised a fact issue"); Atkinson v. National Bank of Commerce, 530 So. 2d 163, 166-67 (Miss. 1988); Fruchter v. Lynch Oil Co,. 522 So. 2d 195, 198-99 (Miss. 1988) (citing *In re* Launius, 507 So. 2d 27, 30 (Miss. 1987)); Smith v. First Fed. Savs. & Loan Ass'n, 460 So. 2d 786, 792 (Miss. 1984) (non-movant has duty of diligence to show issue of material fact); *see* Bourn v. Tomlinson Interest, Inc., 456 So. 2d 747, 749 (Miss. 1984) (non-movant has duty of diligence to show issue of material fact); Brown v. Credit Center, Inc., 444 So. 2d 358, 364 (Miss. 1983). For a further delineation of how the non-movant's burden of production varies depending on who bears the burden of proof at trial on a given issue, see *infra* text accompanying notes 192-94.

[127] FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2727, at 148; *see* Davis v. Davis, No. 07-59308, slip op. at 10-11 (Miss. Jan. 17, 1990).

[128] Sanford v. Federated Guar. Ins. Co., 522 So. 2d 214, 217 (Miss. 1988).

[129] Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987).

dence demonstrating the existence of [a] triable issue of fact,"[131] or "genuine issues for trial."[132] Again, the standard is essentially that used on a motion for a directed verdict.[133]

The non-movant is not required to establish his own evidentiary predicate. Although he may simply rely on material issues raised by the movant's evidentiary predicate, such incidents are rare. Moreover, prudence dictates that the practitioner gild this particular lily with his own facts.[134]

2. What is the flip side to the requirement that the non-movant must respond with diligence?

The non-movant must be given an opportunity to be diligent under the circumstances.[135] If he is deprived of an opportunity for adequate discovery, the court may well grant a continuance or even deny the motion for summary judgment.[136] Indeed, the court has noted, "One of our reasons for so holding [denying summary judgment as premature] is to discourage the practice of parties resisting discovery on the one hand and moving for summary judgment on the other."[137] Albeit both fact-specific five-four decisions, *Cunningham v. Lanier*[138] and *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*,[139] can be read together

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[130] Blackmon v. Payne, 510 So. 2d 483, 489 (Miss. 1987).

[131] Smith v. Sanders, 485 So. 2d 1051, 1054 (Miss. 1986); Brown v. Credit Center, Inc., 444 So. 2d 358, 362 (Miss. 1983).

[132] Newell v. Hinton, 556 So. 2d 1037, 1042 (Miss. 1990).

[133] *See supra* text accompanying notes 67-68.

[134] *See infra* text accompanying notes 157-59.

[135] Mississippi Rd. Supply Co., Inc. v. Zurich-American Ins. Co., 501 So. 2d 412, 415 (Miss. 1987); Smith v. H.C. Bailey Cos., 467 So. 2d 224, 233 (Miss. 1985); Bourn v. Tomlinson Interest, Inc., 456 So. 2d 747, 749 (Miss. 1984).

[136] *See infra* text accompanying notes 202-07.

[137] Smith v. H.C. Bailey Cos., 477 So. 2d 224, 234 (Miss. 1985).

[138] 555 So. 2d 685 (Miss. 1989) (trial court's failure to allow non-movant sufficient time to respond to its sua sponte interrogatories rendered it incapable of considering evidence in light most favorable to non-movant).

[139] No. 07 58745, (Miss. Jan. 31, 1990) (en banc) (failure to permit live testimony at hearing rendered trial court incapable of considering pertinent evidence in light most favorable to non-movant). The court noted: "Justice is only served when a fair opportunity is given a party to oppose a motion for summary judgment . . . . [T]he party against whom the summary judgment has been sought should be given the benefit of every reasonable doubt. . . . [A] trial court is under an . . . . obligation to consider all pertinent evidence in a light most favorable to the non-movant." *Id.* at 6-7 (citations

to stand for the "fair opportunity to oppose" doctrine. "Because consideration of a motion for summary judgment requires a careful review by the trial court of all pertinent evidence in a light most favorable to the non-movant,"[140] the failure to grant the non-movant a reasonable period of time to file opposing documents requires reversal as a "reaffirmation of [our court's] long-standing position that, in the interest of justice and fairness, the Rules of Civil Procedure should be *liberally* construed to permit a party to file amendments or documents in opposition to a motion for judgment."[141]

3. Can the non-movant object to the movant's evidentiary predicate?

Indeed, the non-movant must move to strike or otherwise object to the movant's evidentiary predicate, or the objection will be deemed to have been waived.[142] Furthermore, in the absence of a "gross miscarriage of justice" the court may consider the defective affidavit.[143]

4. When should the non-movant file his opposition to the motion for summary judgment?

It should be done *before* the hearing. The Mississippi Supreme Court has roundly condemned the practice of filing rec-

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omitted).

[140] *Id.*; *see infra* notes 202-07 and accompanying text for a discussion of Rule 56(f) analysis.

[141] *Id.* at 1.

[142] Haygood v. First Nat'l Bank, 517 So. 2d 553, 556 (Miss. 1988) (party must move to strike objectionable affidavit or waive his objection). Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 622 (Miss. 1986) (same).

[143] Brown v. Credit Center, Inc., 444 So. 2d 358, 365 (Miss. 1983); *accord* Terrell v. Rankin, 511 So. 2d 126, 129 (Miss. 1987). It is interesting to speculate as to whether Rule 56 has a positive requirement that the offered evidence meet its strictures or whether any and all admissibility objections can be waived. Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1196 (Miss. 1989), could be read to suggest that even in the absence of objections, inadmissible evidence should not be considered on a summary judgment motion. *See generally* 6 MOORE'S FEDERAL PRACTICE, *supra* note 30, ¶ 56.22, 56-762 n.60 ("[s]ince normally it is required that inadmissible evidence be objected to at trial or it will be admitted, the same general rule should apply when the issue is the granting or denial of summary judgment"). On the stormy seas of appellate review the gross miscarriage of justice port is seldom reached.

ord evidence on the day of the hearing.[144] *Bourn v. Tomlinson Interest, Inc.*[145] admonishes, "The time must arrive in every case when the plaintiff must demonstrate that there is a genuine issue for trial or have summary judgment entered against him."[146]

The court was even more explicit in its warning in *Biggers v. Fox*:[147]

> We will say this: When an attorney is aware that affidavits are needed by a court to reach a decision, it is neither fair to the court nor opposing counsel to wait until the hearing date to file the affidavit. We will not be kindly disposed to an attorney who charges error on the part of a judge who refused to consider such an affidavit, especially if it contains affirmative allegations.[148]

Counsel once burned, becomes twice shy and files early; otherwise, the surprise the non-movant saves for the movant may be his own.

5. How does one determine what facts are "material" within the meaning of Rule 56?

Determination of the materiality of a given fact is a function of the applicable substantive law determined by reference to the claims and defenses asserted in the pleadings.[149] A material fact is one which tends to resolve any of the issues properly raised by the parties;[150] in essence, a material fact is one which is outcome determinative.[151]

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[144] Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 318, 323 (Miss. 1989); Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 415 (Miss. 1988); Biggers v. Fox, 456 So. 2d 761, 763 (Miss. 1984).

[145] 456 So. 2d 747, 749 (Miss. 1984).

[146] *Bourn*, 456 So. 2d at 749. (citing Glesenkamp v. Nationwide Mut. Ins. Co., 71 F.R.D. 1 (N.D. Cal. 1974), *aff'd*, 540 F.2d 458 (9th Cir. 1976).

[147] 456 So. 2d 761 (Miss. 1984).

[148] *Biggers*, 456 So. 2d at 763.

[149] Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640, 643 (Miss. 1987).

[150] Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 415 (Miss. 1988); Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987); Pearl River County Bd. of Supervisors v. South E. Collections Agency, Inc., 459 So. 2d 783, 785 (Miss. 1984).

[151] Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985).

6. When is a material fact a "genuine issue" for purposes of opposing a motion for summary judgment?

A material fact presents a genuine issue in at least four instances:

(1) Diametrically opposed facts or testimony—that is, the proverbial swearing match, when the movant swears to one version of a material fact and the non-movant swears just the opposite;[152]

(2) Multiple interpretations of undisputed testimony, such as where there is more than one reasonable interpretation that may be given to undisputed testimony;[153]

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[152] *See, e.g.*, Tucker v. Hinds Co., No. 07-CA-59298, slip op. at 5 (Miss. Mar. 21, 1990) (swearing of opposite versions); Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 7 (Miss. Dec. 20, 1989) ("Material facts are in genuine conflict"); Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58619, slip op. at 10 (Miss. Oct. 4, 1989) (contradictory testimony); Huff v. Hobgood, 549 So. 2d 951, 953 (Miss. 1989) (testimony in direct conflict); Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760, 761-72 (Miss. 1989) (opposing expert affidavits); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 63 (Miss. 1988) (parties swear to opposite versions of facts); Phillips v. Hull, 516 So. 2d 488, 495 (Miss. 1987) (same); Sanford v. Jackson Mall, 516 So. 2d 227, 229 (Miss. 1987) (same); Blackmon v. Payne, 510 So. 2d 483, 489 (Miss. 1987) (contradictory affidavits); Lester Eng'g Co. v. Richland Water & Sewer Dist., 504 So. 2d 1185, 1188 (Miss. 1987) (affidavits in direct conflict).

The Mississippi Supreme Court has apparently not yet reached the issue raised in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), where the Court found the competing inferences that might be drawn from undisputed facts and the absence of any plausible motive to engage in the conduct charged highly relevant as to whether a "genuine issue for trial" existed. *See* Robertson, *supra* note 26, at 16 ("Still, *Matsushita* may be read to suggest that, if a plaintiff's theory of recovery is inherently implausible, he must produce more persuasive evidence to avoid summary judgment than would otherwise be necessary.") In all likelihood the Mississippi Supreme Court will be ready when the opportunity arises. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2726 (credibility); *see also infra* text accompanying notes 309-11; *cf.* Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1196 (Miss. 1989) (part of affidavit which would be admissible "might be totally rejected by the jury").

[153] *E.g.*, Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 7 (Miss. Dec. 20, 1989) ("substantially differing interpretations that reasonably flow from the facts established"); Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58619, slip op. at 10 (Miss. Oct. 4, 1989) ("undisputed facts and testimony from which multiple interpretations could be drawn"); Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 445 (Miss. 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195-96 (Miss. 1989); Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 433-34 (Miss. 1988); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1199 (Miss. 1988); Sanford v. Jackson Mall Shopping Center Co., 516 So. 2d 227, 230 (Miss. 1987); Shelton v. American Ins. Co., 507 So. 2d 894, 896 (Miss. 1987); Dennis v. Searle, 457 So.

(3) Where materially differing but nevertheless reasonable inferences may be drawn from the uncontradicted evidentiary facts;[154] and

(4) Where the purported establishment of the facts has been sufficiently incomplete or inadequate so that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed.[155]

As previously noted, our court often refers to genuine issues of material fact in the general shorthand rubric of a "jury question" or similar phrasing.[156]

7. What then must the non-movant do to show there are genuine issues of material fact for trial which preclude granting summary judgment?

Like the movant, the non-movant may present these genuine issues of material fact by means of a sufficient evidentiary

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2d 941, 944 (Miss. 1984) ("more than one reasonable interpretation that may be given undisputed testimony").

[154] Bobby Kitchens, Inc. v. Mississippi Ins. Guar., No. 07-58619, slip op. at 10 (Miss. Oct. 4, 1989); Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 445 (Miss. 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195-96 (Miss. 1989); Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 433-34 (Miss. 1988); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1199 (Miss. 1988); Sanford v. Jackson Mall Shopping Center Co., 516 So. 2d 227, 230 (Miss. 1987); Shelton v. American Ins. Co., 507 So. 2d 894, 896 (Miss. 1987); Dennis v. Searle, 457 So. 2d 941, 944 (Miss. 1984).

Although the court employs a differing phraseology in instances (2) and (3), they seem in fact to be variations on the same theme.

[155] Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 7; Bobby Kitchens, Inc. v. Mississippi Ins. Guar., No. 07-58619, slip op. at 10 (Miss. Oct. 4, 1989); Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 445 (Miss. 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195-96 (Miss. 1989); Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 433-34 (Miss. 1988); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1199 (Miss. 1988); Sanford v. Jackson Mall Shopping Center Co., 516 So. 2d 227, 230 (Miss. 1987); Shelton v. American Ins. Co., 507 So. 2d 894, 896 (Miss. 1987); Dennis v. Searle, 457 So. 2d 941, 944 (Miss. 1984).

Rule 56(f) also allows overruling the motion for summary judgment if the material facts have not been fully developed. No case appears to have yet explored whether there is any distinction between overruling the motion for summary judgment because of inadequate factual establishment as a "genuine issue of material fact" under Rule 56(c) or because facts have not been fully developed under Rule 56(f). *See infra* notes 202-07 and accompanying text. When the non-movant fails to file a Rule 56(f) affidavit, to a large degree he can make the same argument under the parallel rationale of instance (4).

[156] *See supra* text accompanying notes 128-32.

record using opposing affidavit(s) or other appropriate evidentiary materials.[157] Alternatively, the non-movant can simply argue that the movant's evidentiary predicate discloses genuine issues of material fact on its face, such as multiple interpretations of undisputed testimony.[158] As one commentator points out:

> The party opposing summary judgment does not have a duty to present evidence in opposition to a motion under Rule 56 in all circumstances . . . [t]hat obligation does not exist when the movant's papers demonstrate the existence of a genuine dispute of material fact, when the evidence introduced does not show that the non-moving party's position is a sham, when the matters presented fail to foreclose the possibility of a factual dispute, or when there is an issue as to the credibility of the movant's evidentiary material.[159]

Generally the prudent non-movant will fire with both barrels anyway.

8. Is an opposing affidavit always necessary for the non-movant's evidentiary predicate?

Affidavits are not necessary where genuine issues of material fact are created by other outside material, such as depositions or other discovery materials.[160] Our court recently faced the issue of the non-movant's duty to explain an alleged discrepancy among deposition testimony, an interrogatory answer and a subsequent affidavit offered in opposition to a motion for summary

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[157] MISS. R. CIV. P. 56(e); *see* Magee v. Transcontinental Gas Pipe Line, 551 So. 2d 182, 186 (Miss. 1989); *In re* Launius, 507 So. 2d 27, 30 (Miss. 1987); Smith v. First Fed. Savs. & Loan Ass'n, 460 So. 2d 786, 792 (Miss. 1984); *see supra* text accompanying notes 98-110.

The non-movant (as well as the movant) must always watch the designation of the record. Since a number of circuit courts do not require the filing of discovery material, such as interrogatories, depositions, requests for production, etc., a response to a motion for summary judgment should clearly and independently describe each piece of evidence on which the non-movant relies to create a genuine issue of material fact. With respect to record designation issues which can arise on appeal, see *infra* notes 271, 278-79 and accompanying text.

[158] *See supra* text accompanying notes 152-55.

[159] FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2727.

[160] Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987); Gray v. Baker, 485 So. 2d 306, 308 (Miss. 1986).

judgment.[161] Finding no discrepancy in the non-movant's materials, the court sidestepped addressing this issue directly, but cited with apparent approval federal authorities placing such a duty of explanation on the non-movant.[162]

9. Must the non-movant's evidentiary materials be sworn?

Such a formality is usually, but not necessarily, required. It depends on the form of evidence.[163] As made clear in *Magee v. Transcontinental Gas Pipe Line Corp.*:[164]

> To be sure, Magee's Administratrix' counsel appealed persuasively in her briefs, and if half of what is asserted there were in the record, matters might be otherwise. She runs afoul of established law that the only *unsworn* matters available to a party opposing the motion are undenied allegations in his pleadings and admissions secured under Rule 36, Miss.R. Civ.P. To have power to generate a genuine issue of material fact, any other documents, including but not limited to, depositions, answers to interrogatories, or affidavits must, first, be sworn; second, be made upon personal knowledge; and third, show that the party giving them is competent to testify.[165]

Actually, unsworn matters available under Rule 56 cover a broader range, such as stipulations, admissions at oral argument, documents the court requires the parties to place into evidence, stipulations and agreed uncontested issues of fact in the pretrial order.[166] The point of *Magee*, however, is clear: the opposing material must be permissible evidence under Rule 56.[167]

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[161] Foldes v. Hancock Bank, No. 07-58946, slip op. at 2-5 (Miss. Dec. 6, 1989).

[162] *Id.* at 3-4.

[163] This requirement placed on the non-movant is basically identical to that of the movant. *See supra* notes 98-110 and accompanying text.

[164] 551 So. 2d 182 (Miss. 1989).

[165] *Magee*, 551 So. 2d at 186.

[166] *See supra* text accompanying notes 98-110.

[167] Of course, objection to otherwise inadmissible evidence can be waived. No Mississippi case has apparently explored the theory of whether Rule 56's requirement of sworn firsthand information from a competent witness is a positive prerequisite of the rule or simply a garden variety evidentiary objection which may be waived. The latter proposition seems to be assumed, if not squarely held, by the cases. *But see supra* text accompanying notes 142-43.

10. How effective are sworn answers to interrogatories?

Sworn answers to interrogatories will not always overcome a motion for summary judgment. Generally-framed sworn answers to interrogatories that are long on rhetoric and short on specific facts will be insufficient to create a genuine issue of material fact as a matter of law.[168]

11. Will answers to interrogatories signed by the non-movant's counsel suffice?

No, in order to overcome a motion for summary judgment, the answers must be sworn and based upon personal knowledge. In *Magee* the court found answers to interrogatories to be deficient in three respects: (1) "they [were] signed by counsel; (2) they [were] not given on personal knowledge; and (3) they [did not] provide any information rebutting [the] claim . . . ."[169] On the other hand, certain unsworn materials by counsel can be used on a Rule 56(h) motion for continuance.[170]

12. Where should the non-movant definitely not place his opposing materials?

The non-movant may not create a genuine issue of material fact by arguments and assertions made solely in briefs or legal memoranda.[171] However, admissions in the non-movant's brief may be used to determine there is no genuine issue of material fact, since they are the functional equivalents of admissions on file under Rule 56(c). On the other hand, admissions in the movant's brief may show there is an issue to be tried.[172] It is axiomatic that the non-movant's response should be filed in the lawsuit in which the motion for summary judgment is pending—not in an entirely separate lawsuit.[173]

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[168] Reich v. Jesco, Inc., 526 So. 2d 550, 553 (Miss. 1988).

[169] *Magee*, 551 So. 2d at 187.

[170] *See infra* text accompanying notes 208-10.

[171] *See* Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725 (Miss. 1989); *Magee*, 551 So. 2d at 186; Brown v. Credit Center, Inc., 444 So. 2d 358, 364 (Miss. 1983).

[172] FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2723, at 65-66.

[173] *See* Davis v. Davis, No. 07-59383, slip op. at 10-11 (Miss. Jan. 17, 1990) (filing of separate tort suit not appropriate response for summary judgment motion based on Uni-

13. Is there anything else the non-movant can do to create a genuine issue of material fact?

He may be able to use live testimony at the hearing on the motion for summary judgment.[174] Recently, in *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*,[175] our court analyzed in detail the circumstances under which the non-movant may utilize such testimony at a summary judgment hearing, and applied Rule 43(e), but noted that it should be applied with caution in order to avoid a "mini-trial."[176] In *Cole v. Wiggins*,[177] the court had previously analyzed the trial court's authority for the matter to "be heard wholly or partly on oral testimony" under Rule 43(e) in also holding that the non-movant should have been allowed to examine the defendant-movant as an adverse witness at the hearing. But the court pointed out an alternate analysis available to the trial court would have been to invoke Rule 56(f) and thus permit a continuance for discovery.[178]

Efforts to urge that the non-movant's counterclaim somehow creates some genuine issue of material fact have so far fallen on deaf ears.[179]

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form Enforcement of Foreign Judgments Act).

[174] Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 4-7 (Miss. Jan. 31, 1990); Cole v. Wiggins, 487 So. 2d 203, 206 (Miss. 1986); *see* Davis v. Davis, 508 So. 2d 1062, 1066 (Miss. 1987) (use of evidentiary hearing on motion for summary judgment); FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2723 (discussion of pros and cons of use of oral testimony).

[175] No. 07-58745 (Miss. Jan. 3, 1990).

[176] *Crain*, No. 07-58745, slip op. at 6.

[177] 487 So. 2d 203, 206 (Miss. 1986).

[178] *See infra* text accompanying notes 202-07.

[179] Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1324 (Miss. 1989). "Key argues that the existence of potential set-offs alleged in its pending counterclaim against the subcontractor, when viewed in the light of the alleged collusive activity, raises factual inferences precluding summary judgment. The point escapes us." *Id.*; *accord* Brown v. Credit Center, Inc., 444 So. 2d 358, 364, 366 (Miss. 1983) (mere existence of unresolved counterclaim, unconnected with original claim, will not prevent entry of judgment unless counterclaim also constitutes some defense); *cf.* Atkinson v. National Bank of Commerce, 530 So. 2d 163, 166 (Miss. 1988) (claim that failure to assert a compulsory counterclaim in a prior proceeding precluded summary judgment rejected under the facts). *But see* Cunningham v. Lanier, 555 So. 2d 685, 687 (Miss. 1989) ("[p]roof of the veracity of [non-movant's] counterclaim may preclude a judgment in favor of [movant]"). The Mississippi Supreme Court has not yet addressed this aspect in analytical detail.

14. Will the non-movant's motion to amend his pleadings after the trial court has granted summary judgment suffice to avoid entry of the summary judgment?

Such an untimely motion will probably be unavailing. "A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him."[180] Although the amendment may be allowed, the trial court will not be reversed for overruling it absent an abuse of discretion.[181] Even if the motion is granted, amended pleadings alone can seldom avoid summary judgment.[182]

15. Can the non-movant defeat summary judgment by simply establishing the existence of any genuine issue of fact?

No, the established issue of fact must be material—one that is outcome determinative.[183] The "existence of a hundred contested issues of fact will not thwart summary judgment" if there is no genuine dispute regarding any material facts.[184] "Hot disputes regarding non-material facts" are irrelevant.[185] A fact which "never rises to more then nebulous innuendo of the shot-

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[180] *See supra* notes 124-25 and accompanying text.

[181] *See* Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725, 730-32 (Miss. 1989); Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 623 (Miss. 1986) (amendment denied); Bourn v. Tomlinson Interest, Inc., 456 So. 2d 747, 749-50 (Miss. 1984) (same).

[182] *See* Robertson, *supra* note 26, at 16; *see also supra* notes 157-58 and accompanying text.

[183] *See supra* text accompanying notes 152-56; *see also infra* notes 200-01 and accompanying text (non-movant's failure to establish an essential element of his claim renders any otherwise genuine issue of material fact immaterial).

[184] Robertson, *supra* note 26, at 15; *see* Raines v. Spruill, No. 07-CA-58860, slip op. at 6 (Miss. Mar. 14, 1990) ("Summary judgment is still proper if fact issues are raised and none of them are material"); Haygood v. First Nat'l Bank, 517 So. 2d 553, 555-56 (Miss. 1987) (question is whether evidence could support finding for or against party); New Orleans Great N. Ry. v. Hathorn, 503 So. 2d 1201, 1203 (Miss. 1987) (issue of breach not undisputed); Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987) (summary judgment not substitute for trial of disputed factual issues); Turner v. Johnson, 498 So. 2d 389, 391 (Miss. 1986) (not all disputed fact issues defeat motion for summary judgment); Cole v. Wiggins, 487 So. 2d 203, 207 (Miss. 1986) (opposite versions of matter in issue demonstrate presence of issues of fact); Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985) (presence of fact issue alone not per se entitlement to award of summary judgment).

[185] Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1061 (Miss. 1984).

gun variety" simply will not suffice.[186]

16. Can the non-movant simply rest upon the allegations or denials in his pleadings?

Neither a mere denial by the non-movant of material facts contained in the movant's pleadings nor the unsworn, unadmitted allegations contained in the non-movant's own pleadings are sufficient to create a genuine issue of material fact which will avoid summary judgment.[187] Denials in arguments and briefs suffer the same fate.[188]

17. What role do the pleadings play in a motion for summary judgment?

Pleadings play a very diminished role in summary judgment. The motion itself allows the court to pierce the pleadings to determine if there are triable issues of fact.[189] "The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so."[190] Summary judgment is obviously the flip side of notice pleading.

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[186] Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1324 (Miss. 1989).

[187] "[A]n adverse party may not rest upon the mere allegations or denials of his pleadings." MISS. R. CIV. P. 56(e); *see* Newell v. Hinton, No. 89-CA-0092, slip op. at 5 (Miss. Jan. 31, 1990); Stamps v. Estate of Watts, 528 So. 2d 812, 814 (Miss. 1988); Smith v. Sanders, 484 So. 2d 1051, 1054 (Miss. 1986); Hill v. Consumer Nat'l Bank, 482 So. 2d 1124, 1128 (Miss. 1986) ("Party opposing summary judgment may not rely merely upon the unsworn, unadmitted allegations of his pleadings"); *see also* Robertson, *supra* note 26, at 15. *But see* Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co., 554 So. 2d 884, 885 (Miss. 1989) (recognition that in fraud case "it may not be possible for an opponent to reveal detailed, precise facts in support of his claim").

[188] Brown v. Credit Center, Inc., 444 So. 2d 358, 364 (Miss. 1983); *see supra* note 171 and accompanying text.

[189] *See* McMullan v. Geosouthern Energy Corp., 556 So. 2d 1033, 1036 (Miss. 1990) (imperfections in pleadings not decisive); Shaw v. Burchfield, 481 So. 2d 247, 251 (Miss. 1985) (movant "may pierce the allegations of his opponent's pleadings showing that there are no genuine fact issues that need to be tried").

[190] MISS. R. CIV. P. 56 comment.

Even a failure by the movant to plead in his answer a defense which is subsequently properly raised on a motion for summary judgment may be deemed "technical" because a motion for summary judgment can effectively override the pleadings.[191]

18. Does the non-movant bear any burden of production on the motion for summary judgment?

Yes, the non-movant carries the burden of production on any element of a claim or defense as to which he bears the burden of proof at trial.[192] He must establish a factual premise upon which the trial court may hold that the movant has legal responsibility for his claim; otherwise, summary judgment will be granted against the non-movant. Mississippi has presumably adopted in toto the reasoning of *Celotex Corp. v. Catrett*,[193] in which Justice Rehnquist observed:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing

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[191] Mississippi State Tax Comm'n v. 3300 Corp., 515 So. 2d 912, 916 (Miss. 1987) ("technical defects in the pleadings ought not to be decisive in a motion for summary judgment"). *But see* Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725, 726-32 (Miss. 1989) (affirmed trial court's grant of summary judgment where non-movant belatedly attempted to assert new cause of action not pleaded in complaint in attempt to avoid statute of limitations). Though admittedly diminished, pleadings still play an irreducible role in summary judgment.

[192] Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988) (non-movant plaintiff bore burden of proof at trial on her claim of vicarious liability via control against movant defendant); *see* Atkinson v. National Bank of Commerce, 530 So. 2d 163, 166-67 (Miss. 1988) (non-movants "bore the risk of the inadequacies of the record" as to issues on which they had the burden of proof at trial); *see also supra* text accompanying notes 72-77, 85-87.

[193] 477 U.S. 317 (1986).

> on an essential element of her case with respect to which she has the burden of proof.[194]

19. How will the court view the quality of the opposing proof offered by the non-movant to meet the burden of production? In other words, how does the non-movant know the quantum of proof necessary to bring forward?

The trial court should view the non-movant's offering through the evidentiary prism at issue—for example, the clear and convincing standard in a fraud case.[195] *Fruchter v. Lynch Oil Co.* gives the trial court the proper perspective to view the opposing proof:

> The burden of producing evidence in support of or in opposition to a motion for summary judgment is a function of our rules regarding the burden of proof at trial on the issue in question.[196]

Anderson v. Liberty Lobby, Inc.,[197] eloquently explains:

> [I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the

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[194] *Celotex*, 477 U.S. at 332-23; *see* Galloway v. Travelers Ins. Co., 515 So. 2d 678, 684 (Miss. 1987) (court should grant summary judgment where non-movant who would have burden of proof at trial fails "to make a showing sufficient to establish an essential element of the claim").

[195] *See* The Meridian Star v. Williams, 549 So. 2d 1332, 1336 (Miss. 1989) (public official required in libel case to produce clear and convincing evidence of constitutional actual malice); Johnson v. Delta Democrat Publishing Co., 531 So. 2d 811, 815 (Miss. 1988) (clear and convincing evidence of constitutional malice required); *In re* Estate of Smiley, 530 So. 2d 18, 26 (Miss. 1988) (clear and convincing evidence to establish paternity); Haygood v. First Nat'l Bank, 517 So. 2d 553, 555 (Miss. 1987) (clear and convincing standard of proof for fraud); *see also* McMullan v. Geosouthern Energy Corp., 556 So. 2d 1033, 1037 (Miss. 1990) (clear and convincing standard met where "one witness specifically claims a representation was . . . made" in a fraud case).

[196] *Fruchter*, 522 So. 2d at 198. In the footnote, the court stated:

> In *Galloway* we followed the construction placed upon the language of Rule 56 . . . in [*Celotex*] . . . . Federal Rule 56 is identical to our Rule 56 . . . . [T]he quantum of proof required of the burdened party at trial informs the content of whether a showing of genuine issue of material fact has been made so as to avoid summary judgment.

Id. at 198 n.1 (citations omitted).

[197] 477 U.S. 242 (1986).

> nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.[198]

Mississippi clearly views the evidence through this same "evidentiary prism."[199]

20. Will establishing the existence of a genuine issue of material fact always preclude the granting of summary judgment?

Such a result is not inevitable. Otherwise genuine issues of material fact are rendered immaterial when the non-movant, on a claim or defense as to which he bears the burden of proof at trial, fails to make a showing sufficient to establish an essential element of his claim or defense.[200]
Galloway explains this "all or nothing" approach:

> Our own construction of Rule 56 embodies this concept, that

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[198] *Anderson*, 477 U.S. at 254-55.

[199] *See, e.g.*, Haygood v. First Nat'l Bank, 517 So. 2d 553, 555 (Miss. 1987).

[200] Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198-99, 201 (Miss. 1988) (non-movant failed to make showing on issue of control in agency context); Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 416 (Miss. 1989) (non-movant failed to make showing of proximate cause in negligence claim); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 682-84 (Miss. 1987) (undisputed facts showed non-movant could not make out an element of tortious interference with business); Davis v. Davis, 508 So. 2d 1062, 1066 (Miss. 1987) ("at best this is a dispute regarding an immaterial fact"). *See generally* Atkinson v. National Bank of Commerce, 530 So. 2d 163, 166 (Miss. 1988) (non-movant on issue as to which he bore burden of proof at trial "bore the risk of the inadequacies of the record"); Millican v. Turner, 503 So. 2d 289, 292 n.3 (Miss. 1987) (movant not required to show absence of any genuine issue of material fact on claim as to which non-movant would bear burden of proof at trial).

The supporting cases reflect the complete adoption and the wide-ranging effect of the *Celotex* and *Anderson* rationales in Mississippi Rule 56 jurisprudence. *See infra* text accompanying notes 309-13.

> when a party, opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law.[201]

21. What must the non-movant do if he is not prepared to oppose the motion for summary judgment?

He must file an affidavit or affidavits setting forth specific reasons why he is unable to present the facts in opposition to the motion for summary judgment.[202] To prevail, he must specifically demonstrate how postponement of the court's ruling on the motion for summary judgment will enable him to rebut the movant's showing of the absence of a genuine issue of material fact.[203] Rule 56(f) does not protect the lazy or the dilatory.[204]

Moreover, Rule 56 presupposes that the non-movant has had an adequate opportunity to develop the facts fully before opposing a motion for summary judgment.[205] The ground rules are succinctly laid out for the successful invocation of Rule 56(f), especially when the key facts are in the exclusive possession of the movant. In *Marx v. Truck Renting & Leasing Association*,[206] the court stated:

> Rule 56(f) provides that when a party is unable to produce affidavits to oppose a motion for summary judgment, that party may instead file a motion or affidavit with the court explaining his inability to oppose the motion for summary judgment. In

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[201] *Galloway*, 515 So. 2d at 684 (adopting *Celotex* rationale).

[202] Miss. R. Civ. P. 56(f).

[203] This is somewhat like having to know how to spell a word before looking it up in the dictionary. The tension and interplay between discovery (including its deadlines for completion) and motions for summary judgment are beyond the scope of this article. Suffice it to say, for the practitioner, they are quite real.

[204] Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333, 1344 (Miss. 1987). *See generally* Smith v. H.C. Bailey Cos., 477 So. 2d 224, 232-33 (Miss. 1985).

[205] *See, e.g.* Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58614, slip op. at 10 (Miss. Oct. 4, 1989); Smith v. H.C. Bailey Cos., 477 So. 2d 224, 232-33 (Miss. 1985) ("while it is true that the non-moving party must be diligent in opposing summary judgment . . . he must be given a fair opportunity to be diligent"); *see also* notes 135-41 and accompanying text ("fair opportunity to oppose" doctrine).

[206] 520 So. 2d 1333 (Miss. 1987).

> such cases, the court at its discretion, may, if it finds the reasons offered to be sufficient, postpone consideration of the motion for summary judgment and order among other things that discovery be completed. The rule itself contemplates that the completion of discovery is, in some instances, desirable before the court can determine whether there is a genuine issue of material fact. This is especially true where the party seeking to invoke the protection of Rule 56(f) claims the necessary information rests within the possession of the party seeking summary judgment. However, the party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of material fact." The party opposing the motion for summary judgment may not rely on vague assertions that discovery will produce needed, but unspecified, facts, particularly where there was ample time and opportunity for discovery. This is so because Rule 56(f) is not designed to protect the litigants who are lazy or dilatory, and normally the party invoking Rule 56(f) must show what steps have been taken to obtain access to the information allegedly within the exclusive possession of the other party. Finally, the determination as to the adequacies of a non-movant's Rule 56 affidavits and the decision to grant a continuance or order further discovery rests within the sound discretion of the trial judge and will not be reversed unless his decision can be characterized as an abuse of discretion.[207]

22. Will the representations of the non-movant's attorney in the non-movant's unsworn objection to the court, instead of the non-movant's sworn affidavit, suffice under Rule 56(f)?

These may sometimes suffice, at least where the movant has exclusive possession of most of the potential opposing facts. In *Smith v. H.C. Bailey Cos.*,[208] the Mississippi Supreme Court found sufficient compliance with Rule 56(f) in the non-movant's motions to compel discovery, motion for protective order, and

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[207] *Marx*, 520 So. 2d at 1343-44 (citations omitted) (*affirming* Chancellor's exercise of discretion not to permit Rule 56(f) continuance under circumstances).

[208] 477 So. 2d 224 (Miss. 1985).

unsworn objection to the summary judgment hearing, when the key facts were within the movant's knowledge.[209] Prudent counsel should not rely on such measures, however. The favorable result for the non-movant in the *Smith* case may be akin to the one free bite allowed the dog owner who finds himself a tort defendant. If all else fails, the non-movant may resort to the last refuge of the desperate under Rule 56(f) by obtaining new counsel.[210]

23. What else can the non-movant do if the court denies the Rule 56(f) motion and thus grants the motion for summary judgment, other than appeal?

He can file a motion for reconsideration and/or to alter the summary judgment, to which he may attach the affidavit of the witness who was unavailable at the time of his filing the Rule 56(f) motion for continuance.[211] In *Terrell v. Rankin*,[212] the plaintiff/non-movant moved under Rule 56(f) to seek time to obtain the affidavit of a medical expert in a medical malpractice case.[213] The motion for continuance was denied, partly because it was not filed "prior to the date of the hearing" as required by Rule 56(c).[214] After the motion for summary judgment was granted, the non-movant filed a motion to reconsider and/or to alter the summary judgment, to which the belated affidavit of her medical expert was attached.[215] In this instance the Mississippi Supreme Court found the trial court abused its discretion not to reconsider and deny the motion for summary judgment because consideration of the expert affidavit "undoubtedly would have resulted in a denial of the motion for summary judgment."[216] The net effect of the court's ruling in *Terrell* may be

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[209] *Smith*, 477 So. 2d at 232-33.

[210] Hudson v. Parvin, 51 So. 2d 499, 500 (Miss. 1987). The obvious ethical considerations of such a maneuver under particular factual situations are beyond the scope of this article.

[211] Terrell v. Rankin, 511 So. 2d 126, 129 (Miss. 1987).

[212] *Id.*

[213] *Id.* at 127.

[214] *Id.* at 129.

[215] *Id.*

[216] *Id.* Moreover, it noted that MISS. R. CIV. P. 6(d) provides: "[O]pposing affidavits may be served not later than one day before the hearing *unless* the court permits them

to reopen for the non-movant the evidentiary door which the entry of summary judgment would seem to have closed. Post-*Terrell* decisions will bear close scrutiny on this point.

24. To defeat summary judgment, is it always necessary to show that a genuine issue of material fact has been created?

No, since the movant has the burden of establishing all elements of his claim, if the non-movant can convince the trial court that the record is incomplete on a material issue of fact, then generally the court should deny the motion for summary judgment.[217] This argument that the record is incomplete might help the non-movant salvage a poor trial record on appeal. He may at least live to "fight another day," since at the appellate court level this technique may result in a remand for the limited purpose of allowing development of additional facts.[218]

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to be served at such other time." *Id.* (emphasis added). This proves once more Newton's Third Law of Procedure: For every rule of law there is an equal and opposite rule of law. Perhaps more importantly, the court observed that the movant did not file a motion to strike or object to the motion or affidavit. *Terrell*, 511 So. 2d at 129. In the abstract it would seem that simply opposing the motion might have been sufficient; however, forewarned is forearmed.

[217] Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 7 (Miss. Dec. 20, 1989); Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58619, slip op. at 8 (Miss. Oct. 4, 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195-96 (Miss. 1989); Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414-15 (1987); Smith v. Sanders, 485 So. 2d 1051, 1054-55 (Miss. 1986).

Obviously, the non-movant can also defeat summary judgment, the absence of material facts notwithstanding, by demonstrating that the movant is "not entitled to judgment as a matter of law" in any event. *See supra* notes 126-27 and accompanying text.

[218] *See, e.g.*, Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 445 (Miss. 1989) ("On this record, we simply cannot tell whether any genuine issue of material fact exists"); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1196 (Miss. 1989) ("The record is far from complete . . . in summary, we find that the trial judge was justified in finding that there are simply too many unanswered questions at this stage to render a final decision on the merits, as a summary judgment necessarily does"); Martin v. Phillips, 514 So. 2d 338, 341 (Miss. 1987) ("we must remand the present case to the lower court to more fully develop the . . . facts"); *see also supra* note 155 and accompanying text.

G. The Trial Court's Role in Ruling on Motions for Summary Judgment

1. How must the trial court view the evidence in deciding a motion for summary judgment?

The evidence must be viewed in the light most favorable to the non-movant.[219] The court should view motions for summary judgment with "great skepticism."[220] Essentially the facts should be "slanted" in the non-movant's favor.[221] Accordingly, the non-movant should be given the benefit of every reasonable doubt.[222]

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[219] *See, e.g.*, Tucker v. Hinds County, No. 07-CA-59298, slip op. at 5 (Miss. Mar. 21, 1990); Raines v. Spruill, No. 07-CA-58860, slip op. at 6 (Miss. Mar. 14, 1990); Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 7 (Miss. Jan. 31, 1990); Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 7 (Miss. Dec. 20, 1989); Cunningham v. Lanier, 555 So. 2d 685, 686 (Miss. 1989); Allison v. State Farm Fire & Casualty Co., 543 So. 2d 661, 663 (Miss. 1989); Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 636 (Miss. 1989); Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760, 762 (Miss. 1989); Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1324 (Miss. 1989); Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 415 (Miss. 1988); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1199 (Miss. 1988); Southern Farm Bureau Casualty Ins. Co. v. Brewer, 507 So. 2d 369, 370 (Miss. 1987); Turner v. Johnson, 498 So. 2d 389, 391 (Miss. 1986); Adams v. Fred's Dollar Store, 497 So. 2d 1097, 1099 (Miss. 1986); Hudson v. Bank of Edwards, 469 So. 2d 1234, 1238 (Miss. 1985); Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1061 (Miss. 1984).

Obviously, in order for the court to consider the evidence in the "light most favorable to the non-movant," the court must necessarily have the evidence before it. *See* Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 7 (Miss. Jan. 31, 1990) ("[T]rial court was unable to consider all of the pertinent evidence in a light most favorable to . . . the non-movant, because it did not have all of the pertinent evidence [oral testimony] before it"); Cunningham v. Lanier, 555 So. 2d 685, 686 (Miss. 1989) (trial court's failure to grant non-movant "a reasonable time to file opposing documents" precluded court from conducting "a careful review *of all pertinent evidence in a light most favorable to the nonmovant*").

[220] Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1199 (Miss. 1988); Ratliff v. Ratliff, 500 So. 2d 981, 981 (Miss. 1986).

[221] Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1064 (Miss. 1984). In spite of the usual rule that all doubts are resolved against the movant, there is one inference to which he is entitled by virtue of the last sentence in Rule 56(e). If the movant presents credible evidence that would entitle him to a directed verdict if not controverted at trial, this evidence must be accepted as true in a motion for summary judgment when the non-movant does not offer counter-affidavits or other evidentiary materials supporting his contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(f), why he is unable to present facts justifying his opposition to the motion. FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2711, at 133-37.

[222] Tucker v. Hinds County, 556 So. 2d 1037, 1041 (Miss. 1990); Newell v. Hinton,

2. What should the trial court do if there is doubt as to whether the motion for summary judgment should be granted?

The court should err on the side of denying the motion and generally permit a full trial on the merits.[223] This is especially true in circuit court cases because the Mississippi Constitution vests the non-movant with the right of trial by jury.[224] Obviously the trial court should be careful in a circuit court case to ensure that the right to trial by jury is not improperly abridged.[225]

3. In ruling on a motion for summary judgment, does the trial court actually determine issues of fact?

No, the court decides only whether there are any genuine issues of material fact which should be tried.[226] The Comment

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No. 89-CA-0092, slip op. at 5 (Miss. Jan. 31, 1990); Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 7 (Miss. Jan. 31, 1990); Foldes v. Hancock Bank, 554 So. 2d 319, 321 (Miss. 1989); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs., Inc., 518 So. 2d 1194, 1199 (Miss. 1988).

[223] Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 636 (Miss. 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195 (Miss. 1989); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 64 (Miss. 1988); Pope v. Schroeder, 512 So. 2d 905, 908 (Miss. 1987); Lester Eng'g Co. v. Richland Water & Sewer Dist., 504 So. 2d 1185, 1188 (Miss. 1987); Ratliff v. Ratliff, 500 So. 2d 981, 981 (Miss. 1986); Brown v. McQuinn, 501 So. 2d 1093, 1095 (Miss. 1986); Brown v. Credit Center, Inc., 444 So. 2d 358, 362 (Miss. 1983). Unlike baseball, in summary judgment ties go to the non-movant.

[224] Pope v. Schroeder, 512 So. 2d 905, 908 (Miss. 1987) (requirements of Rule 56(c) are procedural safeguards to prevent deprivation of this right); Mississippi Moving & Storage Co. v. Western Elec. Co., 498 So. 2d 340, 342 (Miss. 1986); Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1061 (Miss. 1984); Brown v. Credit Center, Inc., 444 So. 2d 358, 362 (Miss. 1983); see also MISS. CONST. art. 3, § 31.

[225] However, Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1061 (Miss. 1984), observes, "On the other hand, there is no denial of that right [to jury trial] where under the facts tendered the moving party is entitled to judgment as a matter of law. In such instances, granting the motion no more denies a litigant his right to trial by jury than does the sustaining of a demurrer or granting of a peremptory instruction under our former practice." *See infra* notes 321-23, 333 and accompanying text.

[226] Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 636 (Miss. 1989); Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 433 (Miss. 1988); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 65 (Miss. 1988); Pope v. Schroeder, 512 So. 2d 905, 907 (Miss. 1987); Blackmon v. Payne, 510 So. 2d 483, 489 (Miss. 1987); New Orleans Great N. Ry. v. Hathorn, 503 So. 2d 1201, 1202 (Miss. 1987); Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414-15 (Miss. 1987); Bush v. Mullen, 478 So. 2d 313, 315 (Miss. 1985); Brown v. Credit Center, Inc., 444 So. 2d 358, 362 (Miss. 1983).

succinctly underscores the point:

> A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried.[227]

4. Even if the movant establishes that there are no genuine issues of material fact, does summary judgment automatically follow?

No, the movant must establish that he is entitled to judgment as a matter of law based on those undisputed facts. Where the facts are undisputed and only questions of law are presented, summary judgment is an "appropriate and efficient vehicle" for disposition of the case.[228] "Indeed, where the case turns on questions of law, deficiencies in affidavits with respect to immaterial facts may be disregarded."[229]

5. If the movant establishes that there is no genuine issue of material fact and he is entitled to judgment as a matter of law, does summary judgment automatically follow?

Even where both elements are met, the trial court retains an as-yet undefined "discretion" to deny the motion in any event.[230] In *Donald v. Reeves Transport Co.*[231] the court cautioned:

> Even where the test prescribed in M.R.C.P. 56(c) for granting a

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[227] Miss. R. Civ. P. 56 comment; *see supra* note 226.

[228] Robertson, *supra* note 26, at 15; *see* Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 374-76 (Miss. 1987); Adams v. Fred's Dollar Store, 497 So. 2d 1097, 1099-1100 (Miss. 1986); Modling v. Bailey Homes & Ins., Inc., 490 So. 2d 371, 374-76 (Miss. 1986); Smith v. First Fed. Savs. & Loan Ass'n, 460 So. 2d 619, 622 (Miss. 1984).

[229] Robertson, *supra* note 26, at 15; *see* Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 623 (Miss. 1986). Presumably, deficiencies in any other evidentiary materials with respect to immaterial facts may likewise be disregarded by the trial court.

[230] *See* Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1196 (Miss. 1989); Cunningham v. Lanier, 555 So. 2d 685, 687 n.2 (Miss. 1989) ("[w]hether summary judgment procedure is an appropriate vehicle for disposition of a particular case is unequivocally a question committed to the unfettered discretion of the trial court . . . . restricted only by the substantive aspects of Rule 56 and interpretative case law"). *Quaere*: What happened to de novo review? *See infra* text accompanying notes 268-70.

[231] 538 So. 2d 1191 (Miss. 1989).

> summary judgment appears to have been met in its entirety, a judge is not ordinarily required to grant summary judgment.[232]

The court went on to quote Wright, Miller & Kane, for the proposition that:

> [I]n most situations in which the moving party seems to have discharged his burden of demonstrating that no genuine issue of fact exists, the court has discretion to deny a Rule 56 motion. This is appropriate since even though the summary judgment standard appears to have been met, the court should have the freedom to allow the case to continue when it has any doubt as to the wisdom of terminating the action prior to a full trial.[233]

Interestingly, the court in *Donald* deletes the last sentence of the quoted text, which observes in ironic understatement:

> Of course, too frequent exercise of discretion to deny summary judgment by the courts would vitiate the utility of the procedure.[234]

The practitioner should beware of the potential confusion created by decisions holding that the power to grant summary judgment is not discretionary.[235] Upon close reading, the meaning of the court is clear:

> Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *The power to grant summary judgment is not discretionary with the trial court and the above test must be met in all cases.*[236]

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[232] *Donald*, 538 So. 2d at 1196.

[233] *Id.* (quoting WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (2d ed. 1983)).

[234] FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2278, at 188; *see infra* text accompanying note 334.

[235] *See, e.g.*, Mississippi Rd. Supply Co. v. Zurich-American Ins. Co., 501 So. 2d 412, 414-15 (Miss. 1987).

[236] Pearl River County Bd. of Supervisors v. South E. Collection Agency, Inc., 459 So. 2d 783, 784-85 (Miss. 1984) (quoting National Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647 (5th Cir. 1962)) (citations omitted) (emphasis added).

The court has no discretion to "stretch" to sustain a motion for summary judgment unless the Rule 56 test is met. However, it does apparently have the discretion to overrule a Rule 56 motion for summary judgment even if it ostensibly meets the requirements of the rule.[237] Apparently no Mississippi case has yet explored whether there is any difference in the rationale behind the *Donald v. Reeves Transport* ruling (denial of summary judgment is discretionary even if the Rule 56 requirements are met), and simply remanding or overruling temporarily the motion for summary judgment for further development of the facts.[238]

6. If the motion for summary judgment is denied, what expenses can the non-movant recover?

Rule 56(h) mandates the award to the non-movant of "reasonable expenses incurred in attending the hearing on the motion." Apparently the only case to consider Rule 56(h) is *Joseph v. Tennessee Partners, Inc.*,[239] where our court stated:

> [Rule 56(h)] allows that if summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorney's fees.[240]

There appears to be no decision defining these expenses. Presumably the award would at least include any taxable costs, including witness fees and costs of subpoenae, but clearly not attorney's fees.[241]

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[237] *See Donald*, 538 So. 2d at 1196 (Miss. 1989). *See generally* Carter v. Clegg, No. 07-CA-58732, slip op. at 4-6 (Miss. Mar. 7, 1990) (discussion of "zone of choice" discretion analysis in Rule 41 context).

[238] *See supra* notes 155, 202-07 and accompanying text. The latter rationale would seem preferable since it would obviate the necessity of deciding whether the trial court's "discretion" had been properly exercised under given facts and circumstances.

[239] 501 So. 2d 371 (Miss. 1987).

[240] *Joseph*, 501 So. 2d at 376.

[241] *Quaere*: Does the definition of "expenses" in the comment to Miss. R. Civ. P. 54(d) (a term not itself used in Miss. R. Civ. P. 54(d)) govern the definition of "reasonable expenses" under Miss. R. Civ. P. 56(h)?

7. What about the recovery of attorney's fees?

Attorney's fees may be recovered if the trial court, again apparently in its discretion, finds the motion is "without reasonable cause."[242] No case has apparently yet addressed the parameters of this discretion, although presumably the test would be an objective one.[243] Likewise, there seems to have been no case construing Rule 56(g), which provides that if the trial court finds the affidavits presented under 56(e) are in bad faith or for the sole purpose of delay, it shall order the party using the bad faith affidavits to pay the amount of reasonable expense which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and, further, that any offending party or attorney may be adjudged guilty of contempt.[244]

8. As a practical matter how can a trial practitioner best help state trial judges on motions for summary judgment?

In the interest of achieving a "just, speedy and inexpensive" result, the trial practitioner can provide practical assistance to trial judges on motions for summary judgment. Since trial judges have no clerks and often even insufficient secretarial help, attorneys can assist through the voluntary utilization of a procedure such as that prescribed in Local Rule 8 of the Uniform Local Rules of the Northern and Southern Districts. This assistance may take the form of providing the trial court with proposed findings of fact, proposed conclusions of law, factual itemizations, or a full brief of the relevant issues.[245] Also a clear

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[242] MISS. R. CIV. P. 56(a); *see Joseph*, 501 So. 2d at 376.

[243] *See supra* text accompanying notes 17-22.

[244] *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2742.

[245] *See Order*, 555 So. 2d LXX (1990) (Mississippi Supreme Court's approval of First Circuit Local Rule 4(d) which requires a memorandum of authorities in connection with summary judgment, as well as proposed findings of fact and conclusions of law). The practitioner should note that MISS. R. CIV. P. 83 as amended by Order dated November 29, 1989, requires that no uniform or local rules shall be effective after Jan. 1, 1991, unless approved by the Supreme Court. 552 So. 2d XLVII (Miss. 1989). Caveat: There appears to be no present central office repository of all local rules. As pointed out in 1 Newsletter of the Litigation/General Practice Section, No. 4, 1989-90, of the Mississippi Bar Association, a committee has been formed to revise and draft uniform local rules of circuit and county court practice. Many feel that these rules will supplant all existing local rules.

designation of the record and detailed delineation of the grounds for summary judgment should be utilized at the trial level, since they will prove to be indispensable on appeal.[246]

H. Protecting the Record

1. What is the evidentiary effect at trial following the trial court's finding of a genuine issue of material fact which precluded the entry of summary judgment?

Such a finding has no bearing on the ultimate resolution of the issue. "It goes without saying that nothing said here should be taken as suggesting in any way, shape, form, or fashion how the issues remaining in the case ought ultimately to be decided after trial on the merits."[247] However, as discussed below, if practicable the court should enter, pursuant to Rule 56(d), an order specifying both the controverted and non-controverted material facts. The facts specified without substantial controversy "shall be deemed established, and the trial shall be conducted accordingly."[248]

2. Can a motion for reconsideration to the trial court be helpful?

Such a motion can be helpful in at least three ways: (1) it can perhaps persuade the trial court to reverse itself; (2) it may also be argued to have put in belatedly offered outside evidentiary materials through the back door; and (3) it may provide the appropriate road map for the appellate court to reverse an improvident grant of summary judgment.[249]

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[246] *See infra* notes 277-78 and accompanying text.

[247] Dennis v. Searle, 457 So. 2d 941, 947 (Miss. 1984).

[248] Miss. R. Civ. P. 56(d); *see infra* notes 261-62 and accompanying text.

[249] *See* Terrell v. Rankin, 511 So. 2d 126, 129 (Miss. 1987); Smith v. H.C. Bailey Cos., 477 So. 2d 224, 234 (Miss. 1985). It is possible, of course, to move to set aside the entry of a summary judgment. Universal Computer Servs., Inc. v. Lyall, 464 So. 2d 69, 72 (Miss. 1985).

3. What order should be obtained from the trial court if the summary judgment is granted?

There should probably be a detailed order setting forth specific findings of fact and conclusions of law, even though these are not required under Rule 52(a).[250] Rule 8(d) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi requires:

> In all motions for summary judgment, the movant must file with the Clerk as a part of the motion an itemization of the facts relied upon in support of the motion which he claims to be both material and as to which there is no genuine issue. The respondent shall either agree that the facts listed by the movant are undisputed or shall state with specificity those facts which are contested and the reasons therefor. In the event of cross-motions for summary judgment in which the parties agree on the facts the parties shall file a stipulation of uncontested facts.[251]

There appears to be no analogous generic local rule in either the circuit or chancery courts.[252] However, the Mississippi Supreme Court has observed in several cases with apparent approval that the trial courts' orders granting or denying summary judgment have utilized findings of fact and conclusions of law.[253] In revers-

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[250] "In all actions *tried* upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly." MISS. R. CIV. P. 52(a) (emphasis added). In Tricon-Metals & Servs., Inc. v. Topp, 516 So. 2d 236, 239 (Miss. 1987) ("*Tricon I*"), the court, in remanding for the trial court's failure to make findings of fact and conclusions of law and refusal to utilize the implied findings doctrine, warned that " 'may' in Rule 52(a) should be construed to read 'generally should.' " The same rationale may well be applicable in Rule 56 cases, particularly in those of any complexity.

[251] UNIF. L.R. D.C. MISS. 8(d).

[252] *See supra* note 245 and accompanying text.

[253] *E.g.*, Evanish v. Berry, 536 So. 2d 7, 9 (Miss. 1988) (court made findings of fact and conclusions of law when it heard motion for summary judgment); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 66 (Miss. 1988) (court may make findings of fact and conclusions of law for purposes of summary judgment); White v. Malone Properties, Inc., 494 So. 2d 576, 577 (Miss. 1986) (lower court correctly granted summary judgment after making findings of fact and conclusions of law); Thomas v. Munson Mach. Co., 463 So. 2d 1044, 1047 (Miss. 1985); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.6 (1986). "There is no requirement that the trial judge make findings of fact. In

ing the grant of summary judgment in *Magnolia Construction Co. v. Mississippi Gulf South Engineers, Inc.*,[254] our court criticized the trial court because the judge "made no findings and conclusions on this issue when he granted Gulf South's motion for summary judgment."[255]

Although these findings and conclusions will have no legal effect on the appellate court since the appellate standard is a de novo review,[256] nevertheless such an order embodying findings of fact and conclusions of law obviously provides excellent guidance for the appellate court.[257] Wright, Miller & Kane note:

> In considering an appeal from the disposition of a Rule 56 motion, the appellate court normally will not have the district court's findings of fact and conclusions of law on the motion before it, since Rule 52(a) makes these findings unnecessary on summary judgment motions. However, if the trial court prepared a memorandum containing this information, as it often will do to provide guidance to the reviewing court of the parties, the higher court can use it to aid in the reviewing process. Indeed, findings, although not required, frequently are helpful.[258]

Moreover, since the appellate court cannot generally consider new theories or newly raised issues in order to reverse a grant of summary judgment, counsel may wish to "tie down" the record in regard to precisely what was and was not considered on the motion for summary judgment.[259] From a practical point of view, respective counsel for the winner and loser have obvious competing interests in the specificity contained in the final form of the order entered by the trial court from which appeal will be

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many cases, however, findings are extremely helpful to a reviewing court." *Id.*

[254] 518 So. 2d 1194 (Miss. 1988).

[255] *Magnolia Constr. Co.*, 518 So. 2d at 1204. *But see* New Orleans Great N. R.R. v. Hathorn, 503 So. 2d 1201, 1202 (Miss. 1987) (reversing summary judgment, court noted that trial court had unwarrantedly "effectively tried the issue" by preparing lists of "disputed and undisputed facts").

[256] *See infra* text accompanying notes 268-70.

[257] Technically a "finding" of fact would indicate that the court has found the fact given has two reasonable interpretations. Under Rule 56 perhaps a more accurate term, at least pedantically, would be a "finding of undisputed fact."

[258] FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2716, at 647-50.

[259] *See id.* § 2716, at 643; *see also infra* text accompanying notes 268-70.

taken.[260]

4. What order should be obtained from the trial court if the summary judgment is denied?

Rule 56(d) straightforwardly notes:

> If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, *shall if practicable* ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.[261]

There appears to be no Mississippi Supreme Court interpretation as to when such an order is "practicable" and when it is not. Likewise, the Comment is silent. Obviously the entry of such an order would be helpful for the same reasons delineated in the response to the immediately preceding question.[262]

I. Appeal

1. Can the movant appeal the denial of a motion for summary judgment?

Rarely can such an appeal be successfully made; the order is interlocutory.[263] The appellant must carry the burden imposed

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[260] *See infra* notes 277-78 and accompanying text.

[261] MISS. R. CIV. P. 56(d) (emphasis added).

[262] While Rule 56(d) has been cited in the context of a partial summary judgment, no specific reference to the "practicable" issue has apparently yet been touched on. *See, e.g.*, Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1061 (Miss. 1984); Dennis v. Searle, 457 So. 2d 941, 944 (Miss. 1984); Brown v. Credit Center, Inc., 444 So. 2d 358, 3673 (Miss. 1983). *See generally* Doyel, *Pretrial Motions Under the Mississippi Rules of Civil Procedure—Rules 12 and 56*, 52 MISS. L.J. 21, 30 (1982).

[263] Robertson, *supra* note 26, at 16; *see, e.g.*, Newman v. Newman, No. 07-CA-58851,

by Mississippi Supreme Court Rule 5, which requires that appellate resolution (1) "[m]aterially advance the termination of the litigation and avoid exceptional expense to the parties, or (2) [p]rotect a party from substantial and irreparable injury, or (3) [r]esolve an issue of general importance in the administration of justice."[264] This is a very heavy burden. Pre-Rule 5 authority does, however, provide a possible exception for a statute of a limitations defense.[265] Although Rule 5 was not technically at issue since the suit was filed before its adoption, *Donald v. Reeves Transport Co.*,[266] sends a clear signal that our court's discretionary authority to permit an interlocutory appeal arising from the overruling of a motion for summary judgment will not be exercised except in the most unusual circumstances.[267]

2. What is the standard of review on appeal for summary judgment?

The Mississippi Supreme Court conducts a de novo review of the lower court's grant of a summary judgment.[268] As ob-

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slip op. at 10 n.2 (Miss. Feb. 21, 1990) ("ordinarily we do not on appeal consider denials of summary judgment, as such an order is not a final judgment"); Fluor Corp. v. Cook, 551 So. 2d 897, 904 (Miss. 1989). If summary judgment is sustained as to one or more, but fewer than all of the claims and parties in multiple party litigation, MISS. R. CIV. P. 54(b) controls, whether or not an immediate appeal may or must be taken. *See* Briscoe's Foodland v. Capital Assocs., 502 So. 2d 619, 622 (Miss. 1986).

[264] MISS. SUP. CT. R. 5.

[265] *See* Kilgore v. Barnes, 490 So. 2d 895, 896 (Miss. 1986) (first official authorization of interlocutory appeals from circuit court prior to adoption of MISS. SUP. CT. R. 5); Minor v. State Dep't of Public Welfare, 486 So. 2d 1253, 1254-55 (Miss. 1986).

[266] 538 So. 2d 1191 (Miss. 1989).

[267] *Donald*, 538 So. 2d at 1194-95. Mississippi has no analog to 28 U.S.C. § 1292(a)(3) (1982), which provides for interlocutory appeal in admiralty claims as a matter of right on the liability issue. 6 MOORE'S FEDERAL PRACTICE *supra* note 30, ¶ 110.19[3]. Presumably an appeal of an order "interlocutory in character . . . rendered on the issue of liability alone, although there is a genuine issue on the amount of damages" pursuant to Rule 56(c) in state practice would be governed by MISS. SUP. CT. R. 5. *See supra* notes 263-66; *see also* 28 U.S.C. § 1292(b) (1982); MISS. SUP. CT. R. 5 comment.

[268] Tucker v. Hinds County, No. 07-CA-59298, slip op. at 5 (Miss. Mar. 21, 1990); Raines v. Spruill, No. 07-CA-58860, slip op. at 6 (Miss. Mar. 14, 1990); Newell v. Hinton, 556 So. 2d 1037, 1041 (Miss. 1990); Davis v. Davis, No. 07-59383, slip op. at 2 (Miss. Jan. 17, 1990); Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725, 727 (Miss. 1989); Foldes v. Hancock Bank, 554 So. 2d 319, 320 (Miss. 1989); Parham v. Moore, 552 So. 2d 121, 123 (Miss. 1989); Huff v. Hobgood, 549 So. 2d 951, 953 (Miss. 1989); Allison v. State Farm Fire & Casualty Co., 543 So. 2d 661, 663 (Miss. 1989); Cossitt v. Federated Guar.

served in *Clark v. Moore Memorial United Methodist Church*:[269]

> We recently repeated the standard of review of grants or denials of summary judgment: This Court conducts *de novo* review of a lower court's grant of summary judgment. "The general standard that an appellate court applies in reviewing the grant or denial of a summary judgment motion is the same as that employed by the trial court initially under Rule 56(c)."[270]

Wright, Miller & Kane note that the appellate court's review is limited in two ways:

Mut. Ins. Co., 541 So. 2d 436, 438-39 (Miss. 1989); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 63 (Miss. 1988).

[269] 538 So. 2d 760 (Miss. 1989).

[270] *Clark*, 538 So. 2d 760 at 762. *But see supra* notes 230, 263 (is the standard de novo or abuse of discretion when the motion is denied?) There appears to be no case discussing the precise parameters by which the appellate court should review a denial of a summary judgment after the case has been tried and won by the non-movant. *See generally* Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58619, slip op. at 7-10 (Miss. Oct. 4, 1989). In The Meridian Star, Inc. v. Williams, 549 So. 2d 1332, 1337 (Miss. 1989), the court observed in passing: "The trial court should have granted summary judgment. Having failed to grant the summary judgment, the trial court erred in denying defendants' motions for directed verdict at the close of all evidence and for judgment notwithstanding the verdict, nothing new having been added by defendants' case." *Id.* at 1337. *Meridian Star* presented the easy case where no new evidence beyond that offered at the summary judgment stage was offered at trial. *Id.* Where there is additional trial evidence the issue becomes: Will the appellate court freeze the inquiry on the sufficiency of evidence to create a genuine issue of material fact at the point in time the trial court should have sustained the summary judgment or must the appellate court view additional evidentiary matter raised in the context of the trial? Analogous federal authority indicates that the inquiry cannot be frozen in time and that any evidence proffered at trial raising a genuine issue must be considered. Thus, in Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 532 (3d Cir. 1976), the Third Circuit rejected as a ground for appeal the trial court's refusal to grant summary judgment because the appellant-movant "refers us to no authority for the proposition that an appellate court will after a jury trial and a verdict review an interlocutory order refusing to grant a motion for summary judgment. No reason in logic or policy suggests that we should do so. Indeed, the seventh amendment might impose an obstacle where, as here, there is sufficient evidence in the record for the case to have gone to the jury." Any error emanating from this early interlocutory ruling would appear to evaporate after the case goes forward to trial. *See generally* Wetz v. State, 503 So. 2d 803, 807-08 n.3 (Miss. 1987) for a discussion of the waiver of any challenge to the sufficiency of the evidence as it existed at an earlier procedural stage as the case progresses through trial. What about additional evidentiary matter contained in a motion for reconsideration? *See* Terrell v. Rankin, 511 So. 2d 126, 129 (Miss. 1987) (lower court should have considered late affidavit when reconsidering summary judgment order); *see also supra* note 230.

(1) It can only consider those papers that were before the trial court—the parties cannot add exhibits, depositions, or affidavits to support their positions nor advance new theories or raise new issues to secure a reversal of the lower court's determination;[271] and

(2) The reviewing court may only determine whether a genuine issue of material fact exists and whether the law was applied correctly. It cannot decide disputed issues of material fact.[272]

3. What is the appellate standard of review if the trial court denies the non-movant's motion under Rule 56(f) for a continuance?

The appellate court will reverse only if there has been abuse of discretion.[273] While such an analysis is fact specific, in *Marx v. Truck Renting & Leasing Association*,[274] the Mississippi Supreme Court found that the chancellor did not abuse his discretion in denying the non-movant's Rule 56(f) motion because the non-movant took no discovery in a five-month period, ingenuously claimed to have no information regarding the business activity of the movant-taxpayer, and made no showing of the probable fruit of any future discovery.[275]

4. On remand, after reversal of the grant of summary judgment, how should the trial court view the evidence?

As the Mississippi Supreme Court has admonished:

> The facts stated here have been slanted in [the non-movant's]

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[271] *But see infra* notes 277-78 and accompanying text.

[272] FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2716, at 650-54. But as to new theories offered by the movant appellee to sustain the trial court's grant of summary judgment, see *infra* notes 277-78 and accompanying text (court has basically held that any theory (which was raised below?) which will uphold the affirmance is permissible). *Quaere*: How much notice of these other grounds must the movant give the non-movant?

[273] *E.g.*, Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333, 1343-44 (Miss. 1987); Hudson v. Parvin, 511 So. 2d 499, 500 (Miss. 1987); Terrell v. Rankin, 511 So. 2d 126, 129 (Miss. 1987); *see also* Crain v. Cleveland Lodge, 1532 Order of Moose, Inc., No. 07-5875, slip op. at 5-7 (Miss. Jan. 31, 1990).

[274] 520 So. 2d 1333 (Miss. 1987).

[275] *Marx*, 520 So. 2d at 1344.

favor. This is both necessary and proper in that summary judgment was entered against him. No facts stated here should by virtue of this opinion be taken as established for purposes of trial on remand.

Indeed, all are enjoined to discern from these pages not so much as a whisper of a suggestion of how any question of evidentiary or ultimate fact ought to be resolved, or, for that matter, what final judgment ought ultimately to be entered. Such are for trial on the merits.[276]

5. Will the successful movant at the trial level be able to argue any ground, including those not relied upon by the trial court, to uphold entry of summary judgment?

Such will probably be the case even without cross-appeal:

> The appellate court does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law and ignore any erroneous basis that the district court may have employed.[277]

Brocato was an easy case, since the ground(s) used for affirmance on appeal had clearly been presented to the trial court. The trial court had simply chosen the first ground offered and not ruled on the alternative grounds. The more difficult question will be whether the Mississippi Supreme Court will uphold a grant of summary judgment on grounds not raised at the trial

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[276] Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055 (Miss. 1984).

[277] Brocato v. Mississippi Publishers Corp., 503 So. 2d 241, 244 (Miss. 1987), (quoting FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2716, at 658); *see* Kirksey v. Dye, No. 07-59078, slip op. at 6 (Miss. Feb. 7, 1990) ("This court may affirm the lower court's grant of summary judgment on grounds other than which the trial court used"). The dissent in *Brocato* noted: "I think the instances where this Court should snatch a trial away from a litigant based on some ground not relied on by the trial court granting summary judgment should be exceedingly rare." *Brocato*, 503 So. 2d at 246. The practice pointer is that the successful movant should, through a well-drawn order granting summary judgment and proper notice of motion for summary judgment, provide a clear record (including hearing transcript?) of all the points of which the non-movant had notice and which the trial court did or could have considered in sustaining the motion for summary judgment. *But see* John Deere Co. v. American Nat'l Bank, 809 F.2d 1190 (5th Cir. 1987) (summary judgment reversed when granted on ground not found in movant's district court brief because movant did not give proper notice.

court—that is, grounds of which the non-movant had no notice.[278]

J. Authorities Available To Construe Mississippi Rule of Civil Procedure 56

1. What are the primary sources for construing Rule 56?

At the present time, primary authority[279] on Mississippi Rule 56 consists of the following:

(1) The text of Rule 56, which to a somewhat large degree is self-evident without the gloss of judicial construction;

(2) The "official" Comment; and

(3) The judicial gloss that has developed through eight years of construction.

2. Are there any secondary explanatory materials available?

There are few secondary sources to guide the practitioner through the maze of summary judgment: there are no treatises or statutory annotations.[280] The decisions which have construed the Rule may be accessed through:

(1) West Digest System under the Digest Topic "Judgment," Key Numbers 178-190;[281]

(2) Shepard's under Mississippi Court Rules, Rules of Civil Procedure 1982, Rule 56, with cites to alphabetic subparagraphs

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[278] The court in *Brocato* enigmatically notes, "Defendants on appeal are, however, entitled to raise any alternative ground based on the pleadings in the court below which support the judgment here." *Brocato*, 503 So. 2d 241 at 244. *Quaere*: How will *Fruchter* impact on this analysis where the non-movant/appellant bore the burden of production at the trial level?

[279] There is presently no general reporting service on the Mississippi Rules of Civil Procedure.

[280] There is a scant smattering of periodical material. *See* Doyel, *supra* note 262, at 29; Robertson, *supra* note 26, at 16. Of course, there are numerous sources available construing the federal counterpart, including the primary federal cases, secondary treatises, and statutory annotations to the rule itself.

[281] Caveat: Not all cases involving summary judgments can be obtained under these key numbers. Cases such as Chatham v. Gulf Publishing Co., 502 So. 2d 647 (Miss. 1987), which involve summary judgment, are difficult to locate because they are not referenced under the judgment headnote, nor do they mention Rule 56 in the decisions. Because many cases not involving summary judgment mention "summary judgment" in passing, computer research "for such hidden cases" can be laborious, if not impractical.

of Rule 56 included; and

(3) WESTLAW by any appropriate method[282] or LEXIS by appropriate method.

3. What are the leading state court cases?

Brown v. Credit Center, Inc.,[283] was our court's first construction of Rule 56.[284] This remarkably farsighted decision is the bedrock of Mississippi jurisprudence on summary judgment.[285] It has been accurately referred to as "the seminal case,"[286] the "leading decision,"[287] or the "leading case."[288] Its "progeny"[289] have set out "well established rules regarding motions for summary judgment."[290] "Interpretation of this rule [Rule 56] has been set forth in detail" in *Brown*.[291] "The ground

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[282] For example, those methods contained in research notes on page 1 of MISSISSIPPI RULES OF COURT (West Publishing Co. 1989).

[283] 444 So. 2d 358 (Miss. 1983).

[284] Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 374 (Miss. 1987) ("Following adoption of this rule, we interpreted the language contained within a motion for summary judgment first in *Brown v. Credit Center, Inc.*").

[285] Ironically our leading case was based on a suit filed before the adoption of Rule 56, in which the rule was applied in effect by agreement and/or waiver. The decision by Justice Robertson touches on nearly all summary judgment issues and is truly a tour de force. One is reminded of Justice Story's opinion (although an associate justice, he was sitting on the circuit court) in De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815), in which he seemed inexplicably able to produce his 79-page opinion by quill pen within 14 days after delivering the judgment. His biographers have discovered that the solution was simple. The opinion was "already written, awaiting the opportunity that De Lovio's appeal provided to publish his great partisan essay on the proper scope of American admiralty jurisdiction." N. HEALY & D. SHARPE, ADMIRALTY CASES AND MATERIALS 13 (2d 1986); *see* G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 129 (1971); *see also* K. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 207 (1985).

[286] Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1198 (Miss. 1988).

[287] Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 636 (Miss. 1989) ("the leading decision by this Court on the issue of summary judgments").

[288] Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 433 (Miss. 1988) ("the leading case by this Court dealing with the issue of summary judgments and Rule 56").

[288] Pursue Energy Corp. v. Perkins, No. 07-CA-58744, slip op. at 9 (Miss. Feb. 28, 1990) (extensive footnote enumerating "*Brown*'s progeny"); Baugh v. Baugh, 512 So. 2d 1283, 1286 (Miss. 1987). It has been cited at least 70 times in subsequent decisions.

[290] *Baugh*, 512 So. 2d at 1286.

[291] Smith v. H.C. Bailey Cos., 477 So. 2d 224, 232 (Miss. 1985).

rules regarding summary judgment are well settled in a long line of cases beginning with" *Brown.*[292] It provides the "guidelines"[293] in summary judgment cases by setting out "familiar standards."[294] Earlier when the court observed that "[t]he nuances and contours of our not quite four-year-old summary judgment procedure are becoming familiar and established," it attributed the state of Mississippi law on summary judgment to *Brown* "and its progeny."[295]

These guidelines and standards provided by *Brown* have become settled and familiar law, as set forth in numerous decisions.[296] The court has now come to see "the law governing grant or denial of a motion for summary judgment as familiar and well established."[297] The court has lately noted that viewing summary judgments is an "increasingly familiar posture."[298]

Indeed, the basic tenets of summary judgment construction have become so familiar and established that they have reached

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[292] Walker v. Skiwski, 529 So. 2d 184, 185 (Miss. 1988).

[293] *Id.*

[294] Davis v. Davis, 508 So. 2d 1062, 1066 (Miss. 1987).

[295] Shaw v. Burchfield, 481 So. 2d 247, 251 (Miss. 1985).

[296] *E.g.*, Pursue Energy Corp. v. Perkins, No. 07-CA-53744, slip op. at 9 (Miss. Feb. 28, 1990); Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988); Dennis v. Searle, 457 So. 2d 941, 943 (Miss. 1984). Among the more significant of the post-*Brown* decisions are Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1196 (Miss. 1989) (trial court has discretion to deny motion for summary judgment even if all requirements for grant of motion have been met by movant); Atkinson v. National Bank of Commerce, 530 So. 2d 1163 (Miss. 1988) (risk of inadequacies of record placed on non-movant as to issues on which he bears ultimate burden of proof at trial); Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988) (explanation of non-movant's burden of production on issues as to which she bears burden of proof at trial); Haygood v. First Nat'l Bank, 517 So. 2d 533, 556 (Miss. 1987) (adoption of *Anderson* "evidentiary prism"); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 684 (Miss. 1978) (non-movant's failure to establish an essential element of a claim or defense on which he bears the burden of proof at trial renders all other facts immaterial, and movant is entitled to judgment as a matter of law). For a broad variety of cases utilizing Rule 56, see Appendices A, B.

[297] *See, e.g.*, Newell v. Hinton, 556 So. 2d 1037, 1041 (Miss. 1990); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 63 (Miss. 1988)("The law governing the grant or denial of a motion for summary judgment is familiar and well established"); Allison v. State Farm Fire & Casualty Co., 543 So. 2d 661, 663 (Miss. 1989); Clark v. Moore United Methodist Church, 538 So. 2d 760, 762 (Miss. 1989).

[298] *Walker*, 529 So. 2d at 185 ("We confront today's appeal in an increasingly familiar posture. The Circuit Court has granted Skiwski's motion for summary judgment").

the point of being termed a "theology."[299] If the construction of Rule 56 has reached the level of a theology, then Justice Robertson is clearly its Moses, the lawgiver. He has written at least twenty-nine opinions on the subject, which have been followed by the other members of the court.[300] Surely Justice Robertson was correct when he wrote:

> If properly administered—and we are definitely getting there—Rule 56 does not prevent litigation of cases that really do present bona fide controversies for trial. On the other hand, by separating the real from the pretended, the meritorious from the non-meritorious, the rule can and does conserve time and money. Even from the vantage point of the loser, the rule serves as a (perhaps involuntary) procedure whereby one cuts his losses. *Rule 56 is here to stay.*[301]

4. If there is no Mississippi authority on point, is federal authority persuasive?

The Mississippi Supreme Court has clearly held that federal authority in highly persuasive, if not controlling, in such a case. Our court has followed and/or cited federal authority in numerous decisions.[302] Indeed, in the seminal case of *Brown v. Credit*

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[299] Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1324 (Miss. 1989); Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985) (Robertson, J.).

[300] *See, e.g.*, Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 186 (Miss. 1989); Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318 (Miss. 1989); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61 (Miss. 1988); Atkinson v. National Bank of Commerce, 530 So. 2d 163 (Miss. 1988); Walker v. Skiwski, 529 So. 2d 184 (Miss. 1988); Reich v. Jesco, Inc., 527 So. 2d 550 (Miss. 1988); Fruchter v. Lynch Oil Co., 522 So. 2d 195 (Miss. 1988); Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640 (Miss. 1987); Hicks v. Thomas, 516 So. 2d 1344 (Miss. 1987); Gregory v. Federal Land Bank, 515 So. 2d 1200 (Miss. 1987); Baugh v. Baugh, 512 So. 2d 1283 (Miss. 1987); Walton v. Bourgeois, 512 So. 2d 698 (Miss. 1987); Gray v. Baker, 485 So. 2d 306 (Miss. 1986); Hill v. Consumer Nat'l Bank, 482 So. 2d 1124 (Miss. 1986); Willis v. Mississippi Farm Bureau Mut. Ins. Co., 481 So. 2d 256 (Miss. 1986); Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985); Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985); Smith v. First Fed. Sav. & Loan Ass'n, 460 So. 2d 786 (Miss. 1984); Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055 (Miss. 1984); Dennis v. Searle, 457 So. 2d 941 (Miss. 1984); Brown v. Credit Center, 444 So. 2d 358 (Miss. 1983).

[301] Robertson, *supra* note 26, at 14 (emphasis added).

[302] *See, e.g.*, Crain v. Cleveland Lodge 1532, Order of Moose, No. 07-58745, slip op. at 6 n.2 (Miss. Jan. 31, 1990); Magee v. Transcontinental Gas Pipe Line, 551 So. 2d 182, 186 (Miss. 1989); Allison v. State Farm & Casualty Co., 543 So. 2d 661, 664 (Miss. 1989);

Center, Inc.,[303] the court made its position clear:

> We observe here in relevant part the wording of our Rule 56 is identical to the wording of Rule 56 of the Federal Rules of Civil Procedure. Accordingly, we regard authoritative constructions of Federal Rule 56 as persuasive of what our construction of our rule ought to be. As the author of this opinion has urged in another rule's context: "[T]here is much to be said for uniformity in interpreting the identical language of the Federal and Mississippi versions [of Rules of Civil Procedure]. A disparity in interpretation would inevitably lead to forum shopping, which has been a perceived evil for at least half a century."[304]

Later, with specific reference to the 1986 United States Supreme Court decision in *Celotex Corp. v. Catrett*, our court observed: "The High Court's interpretation of the federal counterpart to our Rule 56, though not binding upon us, is 'persuasive of what our construction of our rule ought to be.' "[305] To date it appears there have been no differences in construction between the Mississippi Rule 56 decisions and any cited federal cases. It remains to be seen, however, precisely what are "authoritative

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Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 636 (Miss. 1989); Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195-96 (Miss. 1989); Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760, 762 (Miss. 1989); Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988); Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 416 (Miss. 1988); Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640, 642 (Miss. 1987); Haygood v. First Nat'l Bank, 517 So. 2d 553, 555-56 (Miss. 1987); Marx v. Truck Rental & Leasing Ass'n, 520 So. 2d 1333, 1343-44 (Miss. 1987); Gregory v. Federal Land Bank, 515 So. 2d 1200, 1204 (Miss. 1987); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 683 (Miss. 1987); Pope v. Schroeder, 512 So. 2d 905, 907-08 (Miss. 1987); Shaw v. Burchfield, 481 So. 2d 247, 481 So. 2d 247, 252 (Miss. 1985).

[303] 444 So. 2d 358 (Miss. 1983).

[304] *Brown*, 444 So. 2d at 364 n.1 (quoting Robertson, *Joinder of Claims and Parties —Rules 13, 14, 17 and 18*, 52 MISS. L.J. 37, 63 (1982)). *But see* King v. King, 556 So. 2d 716, 720 (Miss. 1990) (Robertson, J., concurring) (concurrence laments substantial deviation in Rule 59-60 context from the notion that the federal construction of the counterpart rule will be "persuasive on what our construction of our similarly worded rule ought to be").

[305] Galloway v. Travelers Ins. Cop., 515 So. 2d 678, 683 n.5 (Miss. 1987); *see also* Clark v. Viniard, 548 So. 2d 987, 991 (Miss. 1989) ("This Court often looks to federal authority when construing state rules of civil procedure; (construing MISS. R. CIV. P. 59(d)); *see supra* note 24 and accompanying text.

constructions."[306]

The practitioner should be aware that the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has published its preliminary draft of proposed amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure (September 1989). The changes to Federal Rule 56, if adopted, would be significant. The stated purpose of the revision is to "provide guidance on several troublesome issues arising under the present rule."[307] It specifically notes: "In articulating the standard for summary disposition of an action, the revised text reflects dicta of the Supreme Court in *Anderson v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett.*"[308] Obviously, these developments will bear a close watch.

5. Has the recent United States Supreme Court trilogy of summary judgment cases[309] been adopted by the Mississippi Supreme Court?

Our court has clearly embraced *Celotex* and *Anderson.* It apparently has not been called upon to construe directly the effect of *Matsushita.*[310] Moreover, shortly after the rendition of the trilogy, Justice Robertson wrote:

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[306] It will be interesting to observe what our court considers as "authoritative constructions" when confronted with issues not yet addressed by the United States Supreme Court against the backdrop of a split among the federal circuit courts of appeals. Will the Fifth Circuit's view be adopted on a geographical lex loci as opposed to doctrinal analysis?

[307] Preliminary Draft of proposed amendments at 112.

[308] *Id.* at 117. As of April 1, 1990, there were no proposed amendments to MISS. R. CIV. P. 56 pending before the Advisory Committee on Rules.

[309] Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). There are numerous articles analyzing the impact and meaning of this trilogy. *See, e.g.*, Collins, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491 (1988); Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court Term*, 36 EMORY L.J. 171 (1988); Nelken, *supra* note 6; Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988); Note, *The Supreme Court — Leading Cases*, 100 HARV. L. REV. 100, 250-58 (1986).

[310] No Mississippi cases have cited *Matsushita.* One could certainly argue with force that it has been adopted vicariously because of the interrelationship among the entire trilogy of United States Supreme Court cases.

> There has been much talk about three recent decisions of the Supreme Court of the United States. These are: [*Matsushita*, *Celotex Corp.*, and *Anderson*]. Each of these cases involved a construction of Rule 56 of the Federal Rules of Civil Procedure, a rule in relevant part identically worded with Mississippi Rule 56.
>
> Some have seen in this trilogy of decisions a general easing of the burden imposed on one moving for summary judgment, although others argue that the decisions are really nothing new. Each case is quite complex. Each is fact specific. Still, *Matsushita* may be read to suggest that, if a plaintiff's theory of recovery is inherently implausible, he must produce more persuasive evidence to avoid summary judgment than would otherwise be necessary. *Celotex* holds that, on issues where the non-moving party has the burden of proof, the moving party is not required to prove the absence of an issue of fact; that is, the burden remains where it will fall at trial—upon the non-moving party. *Anderson*, a libel case wherein the non-movant had a clear and convincing burden of proof standard, held that this lessened the burden upon the party moving for summary judgment.
>
> These cases are of importance in Mississippi, for we have held from the outset that federal construction [sic] of Rule 56 are "persuasive of what our construction of our similarly worded rule ought to be."
>
> In *Galloway v. Travelers Insurance Co.*, we adopted *Celotex*. We affirmed a summary judgment against the plaintiff because the plaintiff "failed to make an adequate showing on an essential element on which he would bear the burden of proof at trial." Whether *Matsushita*, *Celotex*, and *Anderson* will work a change of significance in Mississippi summary judgment practice remains to be seen. Suffice it to say that each should be read and studied with great care.[311]

The adoption of *Celotex* has proceeded apace,[312] as has that of *Anderson*.[313] It is fair to say that the continuing ripple effect

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[311] Robertson, *supra* note 26, at 16 (citations omitted).

[312] *E.g.*, Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988); Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 416 (Miss. 1988); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 683 (Miss. 1987); Davis v. Davis, 508 So. 2d 1062, 1066 (Miss. 1987); Millican v. Turner, 503 So. 2d 289, 292 (Miss. 1987).

[313] *E.g.*, The Meridian Star, Inc. v. Williams, 549 So. 2d 1332, 1336-37 (Miss. 1989);

of this major trilogy of United States Supreme Court cases will shape and guide the course of Mississippi's summary judgment experience well into the future.

III. Conclusion

Undoubtedly the major discernible trend in the Mississippi Supreme Court's summary judgment decisions is the acceptance and growth of Rule 56.[314] Despite the reluctance which first greeted it, there appears today to be more than a grudging acceptance of the rule in the state trial courts.[315] Indeed, numerous cases have now upheld grants of summary judgment by the trial courts.[316] Indicative of this growing acceptance, *Galloway v. Travelers Ins. Co.*[317] cited with approval the United States Supreme Court's language in *Celotex*:

> The Federal Rules of Civil Procedure have for more than 50 years authorized motions for summary judgment upon proper showing of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded *not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole*, which are designed "to secure the just, speedy, and inexpensive determination of every action.[318]

White v. State, 532 So. 2d 1207, 1220 (Miss. 1988); Johnson v. Delta Democrat Publishing Co., 531 So. 2d 811, 815 (Miss. 1988); *In re* Estate of Smiley, 530 So. 2d 18, 27 (Miss. 1988); Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988); Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640, 642 (Miss. 1987); Haygood v. First Nat'l Bank, 517 So. 2d 553, 555 (Miss. 1987); Mullins v. Ratcliff, 515 So. 2d 1183 (Miss. 1987); Davis v. Davis, 508 So. 2d 1062, 1066 (Miss. 1987). Our court has apparently not yet faced the scintilla issue raised in *Anderson*.

[314] Cunningham v. Lanier, 555 So. 2d 685 (Miss. 1989), and Crain v. Cleveland Lodge No. 1532, Order of Moose, Inc., No. 07-58745, slip op. (Miss. Jan. 31, 1990) could be read to indicate that our court has reached a second generation analysis in which the predominent issue is the proper administration of Rule 56, as opposed to earlier cases which critically analyzed the fundamental appropriateness of utilizing Rule 56 in state court practice. *See supra* notes 138-41 and accompanying text.

[315] "Notwithstanding its laudable purposes, Rule 56 arrived in an atmosphere of controversy, not all of which has dissipated to this day." Robertson, *supra* note 26, at 14.

[316] A representative sampling (including partial grants or denials in the same case) of 110 cases reveals 57 have upheld the trial court's grant of summary judgment and 56 cases have reversed the trial courts' grant of summary judgment.

[317] 515 So. 2d 678 (Miss. 1987).

[318] *Galloway*, 515 So. 2d at 683-84 (citing *Celotex* and Fed. R. Civ. P. 1) (emphasis

While its integration into Mississippi civil practice is not yet fully complete, Rule 56 is certainly no longer a judicially scorned and disfavored procedural shortcut. On the contrary, the rule is now a useful tool for every trial practitioner. From the seminal case of *Brown v. Credit Center, Inc.*, through the fleshing out of its numerous progeny, the rule, its contours, and nuances[319] have become so established as to be denominated a "theology"[320]—one with which every trial practitioner must be familiar.

Despite the growing acceptance of summary judgment, there is in the Mississippi Supreme Court's construction of Rule 56 an undeniable undercurrent led largely by Justice Dan Lee. This undercurrent is propelled by the inherent skepticism and distrust engendered by the rule's deprivation of a party's right to trial by jury.[321] For example, in *Pope v. Schroeder*,[322] in reversing a summary judgment against one defendant, Justice Lee pointedly observed:

> In keeping with these decisions, we think summary judgment should not be used to *snuff out a litigant's right to trial* unless it is appropriate under the rule. The requirements of Rule 56(c), far from being a mere extension of our liberal procedure exalting substance over form, represent a procedural safeguard to prevent the unjust deprivation of a litigant's constitutional right to a jury trial. Thus, we cannot stress too strongly that a trial court should require compliance with Rule 56(c) before entertaining a motion for summary judgment.[323]

It is probably not by coincidence that Justice Lee authored *Donald v. Reeves Transport Co.*,[324] in which our court adopted the rule that even where the requirements of Rule 56 are ostensibly

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added). The same may now be said of Mississippi Rule 56.

[319] Pursue Energy Corp. v. Perkins, No. 07-CA-58744, slip op. at 7 (Miss. Feb. 28, 1990) ("Nuances of summary judgment procedures" . . . . "have been amply addressed" . . . . [and] "need not be reproduced").

[320] *See supra* text accompanying notes 299-300.

[321] *See supra* notes 223-25 and accompanying text.

[322] 512 So. 2d 905 (Miss. 1987).

[323] *Pope*, 512 So. 2d at 908 (emphasis added).

[324] 538 So. 2d 1191 (Miss. 1989).

met the trial court has discretion to deny a Rule 56 motion.[325] In *In re Estate of Smiley*,[326] Justice Lee reversed the trial court's entry of summary judgment.[327] The reversal drew a concurrence from Justice Robertson:

> It seems to my mind that this is precisely the sort of issue most susceptible of resolution via summary judgment. The trial judge is right in this, only to err one hundred eighty degrees in his substantive ruling. I am not quite sure what of value might be added via "a more complete factual development," for we consider what is essentially a question of law. The issue was presented four-square in the court below. It was decided below with the full rationale offered. It has been fully briefed on appeal. It is an issue which is of substantial importance and interest in this state. We have the responsibility to settle it once and for all. I would do so today.[328]

The same tension arose in *Communication Workers of America, Local 10517 v. Gann*,[329] which was a four-four decision with Justice Lee in the majority and Justice Robertson in the dissent. The majority opinion, upholding summary judgment, ironically brought forth this dissent from Justice Robertson:

> The presence of such questions normally preclude[s] summary judgment. But here the majority resolves the question of fact and does so *against—not in favor of*—the party against whom summary judgment was sought. This is bizarre.
>
> The majority finds an "ambiguity of meaning" within the operative union rules. If that be the case, established rules regarding summary judgment proceedings require *denial* of the motion in favor of plenary trial on the merits. Those same rules require reversal where the trial court has summarily resolved the ambiguity, explicitly or as here implicitly. What else is there to say except to note the obvious, that here again the majority marches in reverse, 180 degrees opposite the settled law.[330]

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[325] *Donald*, 538 So. 2d at 1996; *see supra* note 232 and accompanying text.

[326] 530 So. 2d 18 (Miss. 1988).

[327] *Smiley*, 530 So. 2d at 26.

[328] *Id.*

[329] 510 So. 2d 781 (Miss. 1987).

[330] *Communication Workers of Am.*, 510 So. 2d at 790 (emphasis added). Justices

While Justice Lee has authored opinions affirming trial courts' grants of summary judgment,[331] he has authored a significant number of decisions which either uphold the trial court's denial of summary judgment, reverse the trial court's grant of summary judgment, or dissent, sometimes without opinion, from an affirmance of a grant of summary judgment.[332] The inherent policy dichotomy reflected by summary judgment procedure versus plenary trial on the merits will necessarily always engender this healthy debate reflected in Justice Robertson's and Justice Lee's decisions. Justice Lee's protection of the right to trial by jury and his concomitant inherent skepticism toward Rule 56 are in the long, rich tradition of the strict construction of Rule 56 in federal proceedings reflected in the opinions most notably of Judges Jerome N. Frank and Learned Hand.[333]

Thus, if one then carries through with the biblical analogy that Justice Robertson is the Moses of Rule 56, then clearly Justice Dan Lee is its Doubting Thomas. Most of the commandments have now been laid down. There remains some etching to do in the pattern provided by the trilogy (trinity?) of United States Supreme Court decisions. But as to whether our court will always necessarily follow the rule in the same spirit with which it was given remains, at least to some degree, to be seen. Indeed, one might suggest that the discretion in the trial court to deny an otherwise facially correct motion for summary judgment set forth last year in *Donald v. Reeves Transport Co.*

Lee and Robertson also differed in Biloxi Regional Medical Center v. Estate of Ross, 546 So. 2d 667 (Miss. 1989), as to whether summary judgment should apply to a probate claim.

[331] *E.g.*, Prescott v. Bay St. Louis Newspapers, Inc., 497 So. 2d 77 (Miss. 1986); Adams v. Fred's Dollar Store, 497 So. 2d 1097 (Miss. 1986); Modling v. Bailey Homes & Ins., 490 So. 2d 887 (Miss. 1986).

[332] *E.g.* Donald v. Reeves, 538 So. 2d 1191 (Miss. 1989) (affirmed denial of summary judgment); Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318 (Miss. 1989) (Lee, J., dissenting); Holifield v. Pitt Swabbing Co., 533 So. 2d 1112 Miss. 1988) (Lee, J., dissenting); Galloway v. Travelers Ins. Co., 515 So. 2d 678 (Miss. 1987) (Lee, J., dissenting); Blackmon v. Payne, 510 So. 2d 483 (Miss. 1987) (reversed grant of summary judgment); Lester Eng'g Co. v. Richland Water & Sewer Dist., 504 So. 2d 1185 (Miss. 1987); Bush v. Mullen, 478 So. 2d 313 (Miss. 1985) (same); Stringer v. Bufkin, 465 So. 2d 331 (Miss. 1985) (same).

[333] *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 1, § 2727, n.47 at 169, 173-75. This debate will always be with us.

could conceivably, although highly unlikely, prove to be Rule 56's Jericho, if not its Armageddon.[334]

However, by happy coincidence and serendipity, the substantial growth of the construction of Rule 56 in Mississippi coincided with the pronouncement of the trilogy of United States Supreme Court cases. It would seem most unlikely at this point in the judicial development of Rule 56 that our court will vary substantially from its present faithful adherence to the main line of federal decisions. Nevertheless, the summary judgment versus plenary trial debate will always be with us as both a constant policy tension and a reminder to follow the strictures (scriptures?) of Rule 56 carefully. *

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[334] *See supra* notes 230-34 and accompanying text.

* AUTHOR'S NOTE: In *Palmer v. Biloxi Regional Medical Center, Inc.*, No. 07-CA-58671 (Miss. April 25, 1990) (Prather, J.), our court summarized the "nuances . . . delineated in Brown's progeny" and answered several *quaeres* raised in this article. The court affirmed a grant of summary judgment in a medical malpractice case where the nonmovant/plaintiff failed to present "*significant, probative* evidence" to meet his "burden of rebuttal" to establish a genuine issue of material fact on issues as to which he bore the burden of proof at trial because the trail court disqualified his expert's testimony. *Id.* at 13, 17, 22. Absent an abuse of discretion, our court will not reverse the trial court's disqualification even at the summary judgment stage. *Id.* at 17, 21. The court noted that the movant had met his burden of production by "present[ing] *some* evidence showing that proof of one or more elements of negligence [was] absent or insufficient." *Id.* at 14. Cautioning that summary judgment is not an appropriate dismissal vehicle for the nonmovant's deficient discovery responses, *Palmer* further underscores the potent office of Rule 56 to pierce the pleadings by serving as a decisive pretrial discovery tool and marks another significant second generation decision focusing on the proper administration of Rule 56, rather than on its fundamental appropriateness in state court practice. *Id.* at 15.

APPENDIX A

TOPICAL GROUPING OF CASES

BAD FAITH

Allison v. State Farm Fire & Casualty Co., 543 So. 2d 661 (Miss. 1989).

Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58619 (Miss. Oct. 4, 1989).

Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436 (Miss. 1989).

Griffin v. Ware, 457 So. 2d 936 (Miss. 1984).

Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431 (Miss. 1988).

Sanford v. Federated Guar. Ins. Co., 522 So. 2d 214 (Miss. 1988).

Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640 (Miss. 1987).

Stamps v. Estate of Watts, 528 So. 2d 812 (Miss. 1988).

CONSTITUTIONAL LAW

Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

Evanish v. Berry, 536 So. 2d 7 (Miss. 1988).

Kirksey v. Dye, No. 07-59078 (Miss. Feb. 7, 1990).

Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333 (Miss. 1987).

Neal v. State, 525 So. 2d 1279 (Miss. 1987).

Tucker v. Hinds County, No. 07-CA-59298 (Miss. Mar. 21, 1990).

CONTRACT

American Fidelity Fire Ins. Co. v. Athens Stove Works, Inc., 481 So. 2d 292 (Miss. 1985).

Atkinson v. National Bank of Commerce, 530 So. 2d 163 (Miss. 1988).

Biggers v. Fox, 456 So. 2d 761 (Miss. 1984).

Brown v. Credit Center, Inc., 444 So. 2d 358 (Miss. 1983).

Communication Workers, Local 10517 v. Gann, 510 So. 2d 781 (Miss. 1987).

Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co., No. 07-58585 (Miss. Nov. 29, 1989).

Dennis v. Searle, 457 So. 2d 941 (Miss. 1984).

Galloway v. Travelers Ins. Co., 515 So. 2d 678 (Miss. 1987).

Gray v. Baker, 485 So. 2d 306 (Miss. 1986).

Gregory v. Federal Land Bank, 515 So. 2d 1200 (Miss. 1987).

Haygood v. First Nat'l Bank, 517 So. 2d 553 (Miss. 1987).

Hicks v. Thomas, 516 So. 2d 1344 (Miss. 1987).

Hill v. Consumer Nat'l Bank, 482 So. 2d 1124 (Miss. 1986).

Holland v. Kennedy, 454 So. 2d 1305 (Miss. 1984).

Hopton Bldg. Maintenance, Inc. v. United Parcel Serv., Inc., No. 07-CA-59086 (Miss. Mar. 14, 1990).

Hudson v. Bank of Edwards, 469 So. 2d 1234 (Miss. 1985).

Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318 (Miss. 1989).

Lester Eng'g. Co. v. Richland Water & Sewer Dist., 504 So. 2d 1185 (Miss. 1987).

Martin v. Phillips, 514 So. 2d 338 (Miss. 1987).

McMullan v. Geosouthern Energy Corp., 556 So. 2d 1033 (Miss. 1990).

Millican v. Turner, 503 So. 2d 289 (Miss. 1987).

MISS CAL 204, Ltd. v. Upchurch, 465 So. 2d 326 (Miss. 1985).

Mississippi Moving & Storage Co. v. Western Elec. Co., 498 So. 2d 340 (Miss. 1986).

Overstreet v. Allstate Ins. Co., 474 So. 2d 572 (Miss. 1985).

Pearl River County Bd. of Supervisors v. South E. Collections Agency, Inc., 459 So. 2d 783 (Miss. 1984).

Sawyer v. Hannan, 556 So. 2d 696 (Miss. 1990).

Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985).

Shelton v. American Ins. Co., 507 So. 2d 894 (Miss. 1987).

Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61 (Miss. 1988).

Smith v. First Fed. Savs. & Loan Ass'n, 460 So. 2d 786 (Miss. 1984).

Smith v. H.C. Bailey Cos., 477 So. 2d 224 (Miss. 1985).

Southern Farm Bureau Casualty Ins. Co. v. Brewer, 507 So. 2d 369 (Miss. 1987).

Stanton & Assocs. v. Bryant Constr. Co., 464 So. 2d 499 (Miss. 1985).

State ex rel. Pittman v. Ladner, 512 So. 2d 1271 (Miss. 1987).

Universal Computer Servs. Inc. v. Lyall, 464 So. 2d 69 (Miss. 1985).

Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055 (Miss. 1984).

Walker v. Cleveland Lumber Co., 512 So. 2d 695 (Miss. 1987).

Willis v. Mississippi Farm Bureau Mut. Ins. Co., 481 So. 2d 256 (Miss. 1985).

DOMESTIC RELATIONS

Bias v. Bias, 493 So. 2d 342 (Miss. 1986).

Cunningham v. Lanier, 555 So. 2d 685 (Miss. 1989).

Davis v. Davis, No. 07-59383 (Miss. Jan. 17, 1990).

Davis v. Davis, 508 So. 2d 1062 (Miss. 1987).

Hill v. Smith, No. 07-CA-58992 (Miss. Mar. 14, 1990).

Newell v. Hinton, 556 So. 2d 1037 (Miss. 1990).

Newman v. Newman, No. 07-CA-58851 (Miss. Feb. 21, 1990).

Ratliff v. Ratliff, 500 So. 2d 981 (Miss. 1986).

LIBEL AND SLANDER

Baugh v. Baugh, 512 So. 2d 1283 (Miss. 1987).

Brocato v. Mississippi Publishers Corp., 503 So. 2d 241 (Miss. 1987).

Bush v. Mullen, 478 So. 2d 313 (Miss. 1985).

Johnson v. Delta-Democrat Publishing Co., 531 So. 2d 811 (Miss. 1988).

The Meridian Star, Inc. v. Williams, 549 So. 2d 1332 (Miss. 1989).

Prescott v. Bay St. Louis Newspapers, Inc., 497 So. 2d 77 (Miss. 1986).

Staheli v. Smith, 548 So. 2d 1299 (Miss. 1989).

MEDICAL MALPRACTICE

Brown v. McQuinn, 501 So. 2d 1093 (Miss. 1986).

Cole v. Wiggins, 487 So. 2d 203 (Miss. 1986).

Hudson v. Parvin, 511 So. 2d 499 (Miss. 1987).

Hudson v. Rausa, 462 So. 2d 689 (Miss. 1984).

Jenkins v. Forrest County Gen. Hosp., 542 So. 2d 1180 (Miss. 1989).

Parham v. Moore, 552 So. 2d 121 (Miss. 1989).

Phillips v. Hull, 516 So. 2d 488 (Miss. 1987).

Robinson v. Hawkins, 541 So. 2d 1048 (Miss. 1989).

Satcher v. Wiser, 483 So. 2d 694 (Miss. 1986).

Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640 (Miss. 1987).

Smith v. Sanders, 485 So. 2d 1051 (Miss. 1986).

Terrell v. Rankin, 511 So. 2d 126 (Miss. 1987).

Walker v. Skiwski, 529 So. 2d 184 (Miss. 1988).

Walton v. Bourgeois, 512 So. 2d 698 (Miss. 1987).

NEGLIGENCE

Adams v. Fred's Dollar Store, 497 So. 2d 1097 (Miss. 1986).

Blackmon v. Payne, 510 So. 2d 483 (Miss. 1987).

Carpenter v. Stop-N-Go Mkts., Inc., 512 So. 2d 708 (Miss. 1987).

Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760 (Miss. 1989).

Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745 (Miss. Jan. 31, 1990).

Dethlefs v. Beau Maison Dev. Corp., 458 So. 2d 714 (Miss. 1984).

Donald v. Reeves Transp. Co., 538 So. 2d 1191 (Miss. 1989).

Fluor Corp. v. Cook, 551 So. 2d 897 (Miss. 1989).

Foldes v. Hancock Bank, 554 So. 2d 319 (Miss. 1989).

Fruchter v. Lynch Oil Co., 522 So. 2d 195 (Miss. 1988).

Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413 (Miss. 1988).

Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630 (Miss. 1989).

Hargett v. Midas Int'l Corp., 508 So. 2d 663 (Miss. 1987).

Holifield v. Pitts Swabbing Co., 533 So. 2d 1112 (Miss. 1988).

Joseph v. Tennessee Partners, Inc., 501 So. 2d 371 (Miss. 1987).

Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646 (Miss. 1988).

Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182 (Miss. 1989).

Magnolia Constr. Co. v. Mississippi Gulf S. Engr's, Inc., 518 So. 2d 1194 (Miss. 1988).

Marter v. Scott, 514 So. 2d 1240 (Miss. 1987).

Mississippi Rd. Supply Co. v. Zurich Am. Ins. Co., 501 So. 2d 412 (Miss. 1987).

Nash v. Damson Oil Corp., 480 So. 2d 1095 (Miss. 1985).

Pargo v. Electric Furnace Co., 498 So. 2d 833 (Miss. 1986).

Pope v. Schroeder, 512 So. 2d 905 (Miss. 1986).

Riley Bldg. Supplies, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506 (Miss. 1987).

Smith v. City of West Point, 475 So. 2d 816 (Miss. 1985).

Stringer v. Bufkin, 465 So. 2d 331 (Miss. 1985).

Thomas v. Munson Mach. Co., 463 So. 2d 1044 (Miss. 1985).

Turner v. Johnson, 498 So. 2d 389 (Miss. 1986).

Ward v. Ford Motor Co., 484 So. 2d 363 (Miss. 1986).

Webster v. Mississippi Publishers Corp., No. 07-58372 (Miss. Dec. 20, 1989).

White v. Malone Properties, Inc., 494 So. 2d 576 (Miss. 1986).

PROPERTY

Bourn v. Tomlinson Interest, Inc., 456 So. 2d 747 (Miss. 1984).

Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619 (Miss. 1986).

Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Litten v. Grenada County, 437 So. 2d 387 (Miss. 1983).

Modling v. Bailey Homes & Ins., 490 So. 2d 887 (Miss. 1986).

New Orleans Great N. Ry. v. Hathorn, 503 So. 2d 1201 (Miss. 1987).

Pursue Energy Corp. v. Perkins, No. 07-CA-58744 (Miss. Feb. 28, 1990).

Raines v. Spruill, No. 07-CA-58860 (Miss. Mar. 14, 1990).

Sanford v. Jackson Mall Shopping Center, 516 So. 2d 227 (Miss. 1987).

STATUTE OF LIMITATIONS

Huff v. Hobgood, 549 So. 2d 951 (Miss. 1989).

Kilgore v. Barnes, 490 So. 2d 895 (Miss. 1986).

Minor v. State Dep't of Welfare, 486 So. 2d 1253 (Miss. 1986).

Mississippi State Tax Comm'n v. 3300 Corp., 515 So. 2d 912 (Miss. 1987).

Parham v. Moore, 552 So. 2d 121 (Miss. 1987).

Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725 (Miss. 1989).

Reich v. Jesco, Inc., 526 So. 2d 550 (Miss. 1988).

Staheli v. Smith, 548 So. 2d 1299 (Miss. 1989).

WILLS AND ESTATES

Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667 (Miss. 1989).

Estate of Smiley, 530 So. 2d 18 (Miss. 1988).

In re Launius, 507 So. 2d 27 (Miss. 1987).

Shattuck v. Estate of Tyson, 508 So. 2d 1077 (Miss. 1987).

APPENDIX B

ABSTRACT OF SUMMARY JUDGMENT CASES CITED

Adams v. Fred's Dollar Store, 497 So. 2d 1097, 1098 (Miss. 1986) (affirmed trial court's grant of summary judgement in negligence action where driver who struck light pole was trespasser as matter of law) 331, 333, 355

Allison v. State Farm Fire & Casualty Co., 543 So. 2d 661, 664 (Miss. 1989) (affirmed trial court's of summary judgment in action by insureds against insurer; insureds' refusal to answer certain questions pertaining to financial situation precluded coverage under the policy as matter of law) 341, 347, 348

American Fidelity Fire Ins. Co. v. Athens Stove Works, Inc., 481 So. 2d 292, 296 (Miss. 1985) (affirmed trial court's grant of summary judgment where supplier brought action to recover under private construction bond) ..... *

Atkinson v. National Bank of Commerce, 530 So. 2d 163, 166 (Miss. 1988) (affirmed trial court's grant of summary judgment in action by debtors against secured creditor; debtors failed to make adequate record) 305-06, 308, 312, 321, 324, 326, 347-48

Baugh v. Baugh, 512 So. 2d 1283, 1286 (Miss. 1987) (affirmed trial court's grant of summary judgment in slander action where plaintiff failed to demonstrate special damages with particularity, as required to support theory of slander per quod) 291, 307, 346, 348

Bias v. Bias, 493 So. 2d 342 (Miss. 1986) (reversed trial court's dismissal of complaint in divorce proceeding) ..... *

Biggers v. Fox, 456 So. 2d 761, 763 (Miss. 1984) (reversed chancellor's grant of summary judgment in action where attorney sued former partner seeking specific performance of agreement for division of fee; unresolved questions of law and fact precluded summary judgment) 315

Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667, 672 (Miss. 1989) (reversed chancellor's grant of summary judgment in contest over probate of claim against dece-

dent's estate holding that Miss. R. Civ. P. 56 does not apply to contested probate claims) 293

Blackmon v. Payne, 510 So. 2d 483, 484 (Miss. 1987) (reversed trial court's grant of summary judgment holding that trucker was independent contractor and not servant; genuine issues of fact precluded entry of summary judgment as to trucker's employment relationship) 298, 307, 313, 316, 332, 355

Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, No. 07-58619, slip op. at 3, 7-13 (Miss. Oct. 4, 1989) (affirmed trial court's grant of summary judgment granted in action by insured against insurer as to coverage and denial of summary judgment on issue of whether insurer had any other liability; court also affirmed lower court's denial of insured's motion to find insurer liable for bad faith as matter of law, and trial court's holding that insurer could not be liable for punitive damages as matter of law) 295, 316-17, 327, 330, 342

Bourn v. Tomlinson Interest, Inc., 456 So. 2d 747, 749 (Miss. 1984) (en banc) (affirmed chancellor's grant of summary judgment holding that attempted reservation of undivided 1/16th royalty interest in conveyance by general warranty deed was ineffective) 312-13, 315, 322

Briscoe's Foodland, Inc. v. Capital Assocs., 502 So. 2d 619, 622 (Miss. 1986) (affirmed trial court's grant of summary judgment holding that agreement was clearly and unambiguously lease and not purchase and security agreement) 307, 309-11, 314, 322, 333, 341

Brocato v. Mississippi Publishers Corp., 503 So. 2d 241, 245 (Miss. 1987) (affirmed trial court's grant of summary judgment in libel action where article was "an admittedly fair and accurate reporting of an official proceeding") 309, 344-45

Brown v. Credit Center, Inc., 444 So. 2d 358 (Miss. 1983) (affirmed trial court's grant of summary judgment on claim seeking repayment of past due debt; reversed grant of summary judgment on counterclaim alleging creditor failed to comply with Truth in Lending Act) 285, 289-90, 297-98, 302, 312-14, 320, 322-23, 332, 340, 346-49, 353

Brown v. McQuinn, 501 So. 2d 1093, 1096 (Miss. 1986) (reversed trial court's grant of summary judgment in medical malpractice action where trial court held medical experts were not qualified to testify under the locality rule; trial court's decision was rendered prior to *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985)) 289, 298, 332

Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848, 864 (Miss. 1988) (plaintiff's allegations were more than sufficient to withstand threshold scrutiny under MISS. R. CIV. P. 12(b)(6) and MISS. R. CIV. P. 56; therefore chancellor abused discretion by denying motion to amend in complex constitutional litigation arising out of legislation providing funding for Grand Gulf Nuclear Power Plant) ..... *

Bush v. Mullen, 478 So. 2d 313, 315 (Miss. 1985) (reversed trial court's grant of summary judgment in libel and slander action where genuine factual disputes were present as to existence of malice) 302, 332, 355

Carpenter v. Stop-N-Go Mkts., Inc., 512 So. 2d 708, 709 (Miss. 1987) (affirmed trial court's grant of summary judgment in negligence action where convenience store owner as matter of law owed no duty to erect barriers to prevent vehicles from driving through store's plate glass window) 298

Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760, 764 (Miss. 1989) (reversed trial court's grant of summary judgment in slip and fall case where trial court incorrectly held that plaintiff was mere licensee and not invitee and genuine issues of fact existed as to whether church satisfied its duty to plaintiff/invitee) 316, 331, 342, 347, 349

Cole v. Wiggins, 487 So. 2d 203, 206 (Miss. 1986) (reversed trial court's grant of summary judgment in medical malpractice case where genuine issues of material fact existed as to whether patient gave informed consent) 321-22

Communication Workers, Local 10517 v. Gann, 510 So. 2d 781, 785 (Miss. 1987) (affirmed trial court's grant of summary judgment for defendants where union attempted to collect fines levied against defendants who continued to work during

strike; contract provision was unenforceable because it did not set forth in writing reasonable charges to be levied if infractions occurred) 354

Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 446 (Miss. 1989) (affirmed trial court's grant of summary judgment holding that motorist was not entitled to recover under uninsured motorist portion of her policy as matter of law; affirmed trial court's grant of summary judgment on issue of bad faith refusal to pay uninsured motorist benefits and medical benefits prior to particular date; reversed trial court's grant of summary judgment on issue of bad faith refusal to pay medical benefits after particular date) 290, 317, 330, 341-42

Crain v. Cleveland Lodge 1532, Order of Moose, Inc., No. 07-58745, slip op. at 6-7 (Miss. Jan. 31, 1990) (remanded case for new summary judgment hearing because trial court refused to hear live testimony from adverse witnesses in negligence action against parking lot owner) 289, 306, 308-09, 313-14, 321, 331-32, 343, 348, 352

Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co., 554 So. 2d 884 (Miss. 1989) (reversed summary judgment entered in contract case alleging fraudulent inducement; generally mere allegations without detailed and precise facts will not preclude granting of summary judgment but in context of fraud, perpetrator's state of mind may be impossible to reveal) 289, 323

Cunningham v. Lanier, 555 So. 2d 685 (Miss. 1989) (reversed chancellor's summary judgment entered in case where divorced husband sought suspension of alimony payments upon ex-wife's remarriage; chancellor erroneously failed to grant reasonable time for ex-wife to file opposing documents) 291-93, 313, 322, 331, 333, 352

Davis v. Davis, No. 07-59383, slip op. at 1, 8-9 (Miss. Jan. 17, 1990) (affirmed award of summary judgment in consolidated appeal on four foreign judgments enrolled on basis of unpaid child support; ex-husband's general denial filed in separate tort action was insufficient to make showing of genuine

issue) 321

Davis v. Davis, 508 So. 2d 1062, 1067 (Miss. 1987) (affirmed trial court's grant of summary judgment in partition action brought by wife against former husband; husband was entitled to judgment as matter of law) 308, 326, 347, 352

Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984) (affirmed trial court's grant of summary judgment on cause of action alleging fraud where plaintiff's offered "nothing of consequence" to establish actual fraudulent conduct; reversed trial court's grant of summary judgment on plaintiff's contractual claim due to ambiguities in contract which precluded grant of summary judgment) 290, 294, 307, 317, 337, 340, 347-48

Dethlefs v. Beau Maison Dev. Corp., 458 So. 2d 714, 717 (Miss. 1984) (reversed trial court's grant of summary judgment in favor of defendant where it failed to demonstrate absence of genuine issue of material fact in action alleging damage to plaintiff's drainage easement and property) ..... *

Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1195-96 (Miss. 1989) (on interlocutory appeal, court affirmed trial court's denial of summary judgment where there was genuine issue of material fact as to whether employee was acting within scope of his employment when accident occurred) 307, 312, 314, 316, 330, 332-35, 341, 347, 349, 354-55

In re Estate of Smiley, 530 So. 2d 18, 21-23 (Miss. 1988) (reversed entry of summary judgment for established heirs in action by illegitimate children to establish their right in intestate's estate; Mississippi statute which allowed illegitimate to establish heirship retrospective to the effective date of statute was constitutional and thus established heirs not entitled to summary judgment) 290, 295, 308, 311, 325, 352, 354

Evanish v. Berry, 536 So. 2d 7, 9 (Miss. 1988) (affirmed trial court's grant of defendant's motion for summary judgment where plaintiffs, former members of private social club, brought action against club following their expulsion; court held that whether or not defendant violated due process when it voted to expel two members was not subject to judicial

review) 338

Fluor Corp. v. Cook, 551 So. 2d 897 (Miss. 1989) (dismissed appeal from nonsuit order granted after denial of motion for summary judgment in wrongful death action against refinery; nonsuit did not constitute final order) 341

Foldes v. Hancock Bank, 554 So. 2d 319 (Miss. 1989) (reversed trial court's order entered summary judgment order entered in slip and fall cases where plaintiff's deposition testimony and affidavit were sufficient to create genuine issue of fact as to bank's negligence in maintaining parking lot area) 319, 332, 341

Fruchter v. Lynch Oil Co., 522 So. 2d 195, 201 (Miss. 1988) (affirmed trial court's grant of summary judgment in personal injury action where no genuine issue existed to establish that defendant was liable to plaintiff based upon doctrine of respondeat superior) ... 287, 298-301, 312, 324-26, 347-49, 352

Galloway v. Travelers Ins. Co., 515 So. 2d 678, 684 (Miss. 1987) (affirmed trial court's grant of summary judgment holding that rate of interest charged to corporation formed only to obtain financing for profit-oriented venture was not usurious if charged to individual, and that due to plaintiff's default on its loan to defendant, defendant had legal right to foreclose on its deed of trust, and thus defendant had not tortiously interfered with plaintiff's business) 307-08, 325-27, 347, 349, 351-53, 355

Gray v. Baker, 485 So. 2d 306, 308 (Miss. 1986) (reversed trial court's grant of summary judgment in action seeking to rescind conveyance where plaintiff alleged fraud; movant failed to affirmatively establish absence of genuine issue of material fact) 291, 298, 318, 348

Gregory v. Federal Land Bank, 515 So. 2d 1200, 1202-05 (Miss. 1987) (affirmed trial court's grant of summary judgment holding that foreclosure was valid as matter of law and that agriculture loan from Federal Land Bank was excluded from coverage of Federal Truth in Lending Act as matter of law) 348-49

Griffin v. Ware, 457 So. 2d 936, 940-41 (Miss. 1984) (affirmed trial court's grant of summary judgment for adjusters in action alleging that they made false reports to their principal and thereby committed tort against insureds) ..... *

Grisham v. John Q. Long V.F.W. Post No. 4057, Inc., 519 So. 2d 413, 416-17 (Miss. 1988) (affirmed trial court's grant of summary judgment for defendants where plaintiff, a V.F.W. patron, failed to establish that lack of lighting at door and lack of sufficient number of security guards were proximate cause of attack by another patron) 315, 326, 331, 349, 351

Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 637 (Miss. 1989) (reversed trial court's grant of summary judgment in action by former psychiatric patient who alleged false imprisonment and negligence; there were factual issues as to whether statutory commitment procedures were followed and whether electric shock treatments administered to patient were proper) 289, 331-32, 346, 349

Hargett v. Midas Int'l Corp., 508 So. 2d 663, 664-66 (Miss. 1987) (reversed trial court's grant of summary judgment in action alleging negligence and breach of implied warrant of merchantability; lack of privity did not bar action and in order to recover for breach of implied warranty of merchantability, buyer must prove that goods were unmerchantable and that defects existed when the goods left seller's control) ..... *

Haygood v. First Nat'l Bank, 517 So. 2d 553, 555-57 (Miss. 1987) (affirmed trial court's grant of summary judgment in deficiency action brought by lender following foreclosure sale; notes were past due as matter of law and debtor failed to develop its theory that lender fraudulently placed their signatures on various documents; however, trial court erred in holding that foreclosure price was not grossly inadequate as matter of law because genuine issue of material fact existed on this claim) 314, 322, 325-26, 347, 349, 352

Hicks v. Thomas, 516 So. 2d 1344, 1348 (Miss. 1987) (affirmed trial court's grant of summary judgment holding that only way individual could acquire title to truck was by obtaining deliv-

ery of an endorsed certificate of title from his transferror in a replevin action; reversed trial court's grant of summary judgment in breach of warranty claim because genuine issues of material fact existed as to whether buyer knew that seller did not have title to the vehicle) 290, 348

Hill v. Consumer Nat'l Bank, 482 So. 2d 1124, 1128 (Miss. 1986) (affirmed trial court's grant of summary judgment holding that bank was entitled to recover where bank established that note was executed by maker, delivered to it, and not paid when due and maker failed to submit affidavits to establish affirmative defense) 323, 348

Hill v. Smith, No. 07-CA-58992, slip op. at 2 (Miss. Mar. 14, 1990) (affirmed grant of summary judgment against grandparents seeking visitation with adopted minor child; grandparents lacked standing to bring action) 298

Holifield v. Pitts Swabbing Co., 533 So. 2d 1112, 1113-18 (Miss. 1988) (affirmed trial court's grant of summary judgment for defendant, the owner/operator of an oil well, where defendant was not subject to liability under the doctrine of strict liability in tort and plaintiff failed to establish the existence of defective valve to support his negligence claim) 355

Holland v. Kennedy, 454 So. 2d 1305, 1305-06 (Miss. 1984) (reversed trial court's grant of summary judgment for defendants where original complaint was filed prior to effective date of Rules of Civil Procedure, although amended declaration was filed subsequent to effective date) 286

Hopton Bldg. Maintenance, Inc. v. United Parcel Serv., Inc., No. 07-CA-59086, slip op. at 3 (Miss. Mar. 14, 1990) (court disposed of indemnity claim summarily since no issue of fact existed as to language of contract) 294-95

Hudson v. Bank of Edwards, 469 So. 2d 1234, 1239 (Miss. 1985) (reversed entry of summary judgment for bank where it filed ejectment action to recover possession of real property purchased from individuals at foreclosure sale and there were material disputed facts as to validity of sale) 331

Hudson v. Parvin, 511 So. 2d 499, 500 (Miss. 1987) (affirmed

trial court's grant of summary judgment against one defendant in medical malpractice action where one of defendant physicians was present during performance of surgical procedure but did not participate; reversed trial court's grant of summary judgment against defendant physician who performed surgery where plaintiff's attorney withdrew on date of hearing on defendant's motion for summary judgment and second hearing was held five days later; court held that plaintiff's new attorney did not have adequate time to prepare) . . . 329, 343

Hudson v. Rausa, 462 So. 2d 689, 696 (Miss. 1984) (affirmed trial court's grant of summary judgment in medical malpractice action against employees of State Health Department holding that as matter of law defendants were acting in their discretionary capacity and, accordingly, enjoined immunity) . . . . . *

Huff v. Hobgood, 549 So. 2d 951, 955 (Miss. 1989) (affirmed trial court's grant of summary judgment for defendant in action alleging breach of warranty of good title; statute of limitations, which began to run from the date of delivery, barred action) 291, 316, 341

Jenkins v. Forrest County Gen. Hosp., 542 So. 2d 1180, 1182 (Miss. 1989) (reversed trial court's grant of summary judgment in medical malpractice action where court held trial judge should have recused himself from hearing in light of facts of case) . . . . . *

Johnson v. Delta-Democrat Publishing Co., 531 So. 2d 811, 815 (Miss. 1988) (affirmed summary judgment for newspaper where public figure alleged libel; article referred to city council, not plaintiff) 325, 352

Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 376 (Miss. 1987) (affirmed trial court's grant of summary judgment in slip and fall case against sponsor of event at Mississippi Memorial Coliseum, Mississippi Fair Commission, and individual members of the Commission) 288, 333, 35-36, 346

Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1322-24 (Miss. 1989) (affirmed trial court's grant of summary judg-

ment for materialman against contractor, subcontractor, and contractor's surety where affidavits failed to create genuine issue of material fact) 290, 307, 310, 315, 321, 323, 331, 348, 355

Kilgore v. Barnes, 490 So. 2d 895, 896 (Miss. 1986) (allowed interlocutory appeal from trial court's denial of defendant's motion for summary judgment based upon statute of limitation) 341

Kirksey v. Dye, No. 07-59078, slip op. at 2-3, 7 (Miss. Feb. 7, 1990) (affirmed award of summary judgment in matter alleging that lieutenant governor's participation on legislative budget committee violated constitutionally-mandated separation of powers) 344

Kountouris v. Varvaris, 476 So. 2d 599, 605 (Miss. 1985) (affirmed trial court's grant of summary judgment holding Greek power of attorney invalid to convey interest in real property; reversed as to personal property) 291, 348

In re Launius, 507 So. 2d 27, 31 (Miss. 1987) (affirmed trial court's grant of summary judgment for estate in will contest where opponent of will failed to offer sufficient evidence to prove confidential relationship or undue influence) 293, 296, 308, 312, 318

Lester Eng'g Co. v. Richland Water & Sewer Dist., 504 So. 2d 1185, 1188 (Miss. 1987) (reversed trial court's grant of summary judgment in action by engineering firm against sewer district for indemnification of expenses incurred in defending third-party claim; genuine issue of fact existed as to whether plaintiff was agent or independent contractor) 307, 316, 332, 355

Litten v. Grenada County, 437 So. 2d 387, 388 (Miss. 1983) (reversed trial court's grant of summary judgment for plaintiff in action to confirm title to land; chancellor erred in applying Rule 56(e) because action was filed before Rules became effective) 286

Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 648 (Miss. 1988) (affirmed trial court's holding that plain-

tiff was mere licensee as matter of law in action alleging negligent maintenance of entrances to defendant's business) . . . *

Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 187 (Miss. 1989) (affirmed trial court's grant of summary judgment in negligence action; plaintiff's decedent was employee as matter of law, and thus workers' compensation was sole remedy) 307-08, 310, 318-20, 348

Magnolia Constr. Co. v. Mississippi Gulf S. Engr's, Inc., 518 So. 2d 1194, 1205 (Miss. 1988) (affirmed trial court's grant of summary judgment for city in action brought by contractor against it to recover money spent in correcting construction work done on city sewer where record reflected city was not negligent; reversed trial court's grant of summary judgment for engineer in action by contractor where there was genuine issue of material fact as to whether engineer assumed any duty to protect contractor and/or was obligated to supply field inspector for project) 317, 331-32, 339, 346

Marter v. Scott, 514 So. 2d 1240, 1243 (Miss. 1987) (affirmed trial court's grant of summary judgment holding that as matter of law, truck owner's employee, who while on vacation stopped to assist disabled truck's driver, was no "emergency employee" as matter of law in personal injury action) . . . . *

Martin v. Phillips, 514 So. 2d 338, 341 (Miss. 1987) (reversed trial court's grant of motion to dismiss which was treated as a motion for summary judgment, where genuine issues of material fact existed in ejectment action as to whether purchasers relied upon decree declaring plaintiff dead in purchasing subject property) 291, 308, 330

Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333, 1345 (Miss. 1987) (en banc) (affirmed trial court's grant of summary judgment in suit to collect taxes; statute was held unconstitutional) 290, 327-28, 343, 349

McMullan v. Geosouthern Energy Corp., 556 So. 2d 1033 (Miss. 1990) (reversed chancellor's entry of summary judgment in contract case alleging fraudulent procurement of settlement releases; material issues of fact remained on content of parties'

agreement) 294, 323-25

The Meridian Star, Inc. v. Williams, 549 So. 2d 1332, 1334-36 (Miss. 1989) (reversed and rendered jury verdict for plaintiffs; plaintiffs failed to meet burden in resisting motion for summary judgment) 297, 325, 342, 351-52

Millican v. Turner, 503 So. 2d 289, 292 (Miss. 1987) (reversed trial court's grant of summary judgment for debtor in action where creditor sued debtor for breach of contract; question of fact existed as to whether amount of time that creditor retained collateral without disposing of it or notifying debtor was unreasonably long and thus precluded creditor from suing on note) 302, 326, 351

Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 434 (Miss. 1988) (reversed trial court's grant of summary judgment for insurer in action brought by insured for alleged wrongful failure to pay under terms of policy; material issues of fact existed as to whether insurance agent was acting as agent for insurer, insureds, or both in purportedly procuring policy covering insured's cabin) 317, 332, 346

Minor v. State Dep't of Welfare, 486 So. 2d 1253, 1255 (Miss. 1986) (affirmed trial court's denial of defendant's motion in paternity suit where defendant argued statute of limitations barred action as matter of law) 341

MISS CAL 204, Ltd. v. Upchurch, 465 So. 2d 326, 330 (Miss. 1985) (reversed trial court's grant of summary judgment where foreign limited partnership brought breach of contract and misrepresentation action; trial court erred in holding that foreign limited partnership not properly registered in Mississippi was barred from utilizing Mississippi courts for cause of action which accrued prior to its registration) ..... *

Mississippi Moving & Storage Co. v. Western Elec. Co., 498 So. 2d 340, 342 (Miss. 1986) (reversed trial court's grant of summary judgment for owner in owner's action for damage to equipment caused by moving company; factual question existed as to whether issue of damages was to be determined under contract or under limitation of liability provision con-

tained in bill of lading) 297, 332

Mississippi Rd. Supply Co. v. Zurich Am. Ins. Co., 501 So. 2d 412, 415 (Miss. 1987) (reversed trial court's grant of summary judgment for insurer in action by seller of bulldozer alleging malicious prosecution; genuine issue of material fact existed as to whether insurer had probable cause to institute suit against seller seeking reimbursement of payment to buyer for loss of bulldozer) 307, 313, 315, 318, 322, 330, 332-34

Mississippi State Tax Comm'n v. 3300 Corp., 515 So. 2d 912, 915-16 (Miss. 1987) (reversed chancellor's grant of summary judgment in favor of taxpayer holding that amended tax assessment was barred by three-year statutory examination period; genuine issue of material fact existed as to whether delay in formulating a correct assessment was due to corporation's own misconduct) ..... *

Modling v. Bailey Homes & Ins., 490 So. 2d 887, 890-91 (Miss. 1986) (affirmed trial court's grant of summary judgment for developer where property owners sought to set aside conveyance of land from city to developer; land shown on plat as "reserved by city for drainage control" was not dedicated for public use, and therefore, city had power to convey land to developer) 308, 333, 355

Nash v. Damson Oil Corp., 480 So. 2d 1095, 1099-100 (Miss. 1985) (reversed trial court's grant of summary judgment for contractor based upon defense that workers' compensation provided sole remedy where employee of subcontractor sued contractor in negligence) ..... *

Neal v. State, 525 So. 2d 1279, 1280 (Miss. 1987) (motion for summary judgment available in post-conviction action) . 289

New Orleans Great N. Ry. v. Hathorn, 503 So. 2d 1201 (Miss. 1987) (reversed trial court's grant of summary judgment for grantor's successors where they brought action against grantee-railroad claiming right of entry upon breach of condition subsequent in deed; factual question existed as to whether grantee railroad which conveyed property "abandoned" it in violation of condition subsequent contained in

deed) 307, 322, 332, 339

Newell v. Hinton, 556 So. 2d 1037 (Miss. 1990) (affirmed grant of summary judgment on issue of liability arising from parties' property settlement agreement in earlier divorce action but reversed chancellor's summary finding of contempt since alleged contemnor was denied opportunity to present defenses) 311, 313, 323, 331-32, 341, 347

Newman v. Newman, No. 07-CA-58851, slip op. at 2, 10 (Miss. Feb. 21, 1990) (reversed chancellor's disposition by summary judgment of divorce case presenting choice of law issue regarding parties' domicile and ex-husband's military retirement pension) 295, 311, 340-41

Overstreet v. Allstate Ins. Co., 474 So. 2d 572, 575 (Miss. 1985) affirmed trial court's grant of summary judgment for insurer where insured's children brought action to recover their share of benefits paid to insured's widow under facility of payment clause in uninsured motorist policy; contract was clear and unambiguous and thus its meaning and effect were properly decided as matter of law) ..... *

Pargo v. Electric Furnace Co., 498 So. 2d 833, 836 (Miss. 1986) (reversed trial court's grant of summary judgment in favor of manufacturer in action brought by worker who received burns after he misstepped and placed his leg in salt bath furnace; genuine issues of material fact existed as to whether design was unreasonably dangerous, whether danger presented was "open and obvious," and whether plaintiff assumed risk of injury) 298

Parham v. Moore, 552 So. 2d 121, 124 (Miss. 1989) (reversed trial court's grant of summary judgment for defendant physician in medical malpractice action where defendant failed to offer proof to support his position that statute of limitations had run; genuine issues of material fact existed as to whether plaintiff could have known or with reasonable diligence could have discovered that she was injured or damaged at certain time) 341

Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725

(Miss. 1989) (affirmed summary judgment disposition of case alleging false arrest and false imprisonment where claims were barred by statute of limitations) 297, 320, 322, 324, 341

Pearl River County Bd. of Supervisors v. South E. Collections Agency, Inc., 459 So. 2d 783, 785 (Miss. 1984) (reversed trial court's grant of summary judgment in favor of hospital's assignee in action against board of supervisors to recover payment for medical treatment given to prisoner; genuine issues of fact existed as to whether prisoner was a county prisoner, indigent and unable to pay for medical treatment, whether prisoner was in need of hospitalization for entire length of time, and whether charges were reasonable and customary) 310, 315, 334

Phillips v. Hull, 516 So. 2d 488, 491-95 (Miss. 1987) (affirmed trial court's grant of summary judgment for defendant-physician in medical malpractice action alleging negligence in performance of tubal ligation where plaintiff failed to present expert medical testimony to contradict defendant's affidavits from physicians indicating no negligence; reversed trial court's grant of summary judgment for defendant on cause of action based upon informed consent where genuine issues of material facts existed and expert testimony was not required; affirmed trial court's dismissal of cause of action based upon breach of warranty) 290, 307, 310, 316

Pope v. Schroeder, 512 So. 2d 905, 907-08 (Miss. 1986) (reversed trial court's grant of summary judgment for defendants when trial court did not comply with Rule 56(c) 286, 290, 295-97, 332, 349, 353

Prescott v. Bay St. Louis Newspapers, Inc., 497 So. 2d 77, 79-81 (Miss. 1986) (affirmed trial court's grant of summary judgment in invasion of privacy action brought by motorist where defendant newspaper published stories concerning motorist's arrests for drunk driving violations; motorist was not placed in false light as matter of law by accurate newspaper stories concerning his arrests) 355

Pursue Energy Corp. v. Perkins, No. 07-CA-58744, slip op. at 1-3 (Miss. Feb. 28, 1990) (court affirmed grant of summary judg-

ment to owner of real property who conveyed undivided mineral interest to defendant; defendant had asserted that deed conveying interest was "irreconcilably repugnant") 295, 346-47, 353

Raines v. Spruill, No. 07-CA-58860, slip op. at 7 (Miss. Mar. 14, 1990) (affirmed summary judgment in title dispute to certain land abutting portions of abandoned street since defendant failed to produce any evidence raising fact issue as to street's location) 312, 322, 331, 341

Ratliff v. Ratliff, 500 So. 2d 981, 981 (Miss. 1986) (reversed trial court's grant of wife's motion for summary judgment where husband moved to modify a prior decree in domestic matter; motion for summary judgment unsupported by affidavit or discovery material should have been denied) 289, 311, 331-32

Reich v. Jesco, Inc., 526 So. 2d 550, 551-53 (Miss. 1988) (affirmed trial court's grant of summary judgment in favor of designer and contractor in action brought by owners of chicken house which collapsed under heavy ice and snow; 10-year statute of limitations period applicable to claims arising out of design and construction of improvement to real property began to run when chicken house was built, and thus precluded action as matter of law) 320, 348

Riley Bldg. Supplies, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 506-08 (Miss. 1987) (affirmed trial court's grant of summary judgment for lender; lender owed no duty to exercise reasonable diligence to see that loan proceeds were paid to subcontractor) 298, 308

Robinson v. Hawkins, 541 So. 2d 1048, 1050 (Miss. 1989) (reversed trial court's grant of summary judgment in favor of physician in medical malpractice suit; complainant's allegation in original declaration filed under old rules of civil procedure were sufficient to state cause of action and thus it was error for the court to sustain defendant's demurrer) 286

Sanford v. Federated Guar. Ins. Co., 522 So. 2d 214, 217-18 (Miss. 1988) (reversed trial court's grant of summary judg-

ment for insurer where insured sued alleging breach of contract and bad faith; genuine issue of material fact existed as to whether insurer would have denied coverage had it known insured had been charged with speeding twice in past 12 months, and because insured's failure to include such in response to insurer's question was representation as opposed to warranty, its falsity barred recovery only if it was material) 297, 312

Sanford v. Jackson Mall Shopping Center, 516 So. 2d 227, 229-30 (Miss. 1987) (reversed trial court's grant of summary judgment in favor of landlord where landlord brought action against tenant alleging breach of lease by failure to pay rent; genuine issues of fact existed as to date on which lease began and thus as to date on which it expired) 316-17

Satcher v. Wiser, 483 So. 2d 694, 695-96 (Miss. 1986) (affirmed trial court's grant of summary judgment for defendant-physicians in medical malpractice action arising out of alleged negligent delivery of child who was stillborn where there was no allegation that timely cesarean section or delivery by forceps would have resulted in viable birth) 286

Sawyer v. Hannan, No. 07-59271, slip op. at 2-3, 5 (Miss. Jan. 24, 1990) (affirmed award of summary judgment in breach of construction contract case where opponent failed to file answer to requests for admissions on time and where late response admitted substance of lawsuit) 307

Shattuck v. Estate of Tyson, 508 So. 2d 1077, 1080-81 (Miss. 1987) (affirmed chancellor's grant of summary judgment in favor of husband's estate where executor of wife's estate brought action to renounce husband's previously probated will; wife's right to renounce husband's will was personal to wife and thus abated at her death) 298

Shaw v. Burchfield, 481 So. 2d 247, 252-55 (Miss. 1985) (affirmed trial court's grant of summary judgment for insurers where agency manager who was terminated by insurers sued alleging breach of contract, interference with contract, and conspiracy; insurers had unambiguous contract right to terminate plaintiff at will, and thus, as matter of law, there was no

breach of contract; plaintiff's failure to establish bad faith made summary judgment proper on tortious interference claim; because actions of insurers were lawful, insurers were entitled to summary judgment on conspiracy claim) 298, 315, 323, 347-49

Shelton v. American Ins. Co., 507 So. 2d 894, 895-97 (Miss. 1987) (affirmed trial court's grant of summary judgment for insurer in action brought by insured-life underwriter seeking damages from insurer under professional E&O liability policy as result of insurer's failure to defend suit against insured; insurance contract was clear and unambiguous, and thus summary judgment was appropriate) 317

Sherrod v. United States Fidelity & Guar. Co., 518 So. 2d 640, 643-46 (Miss. 1987) (affirmed trial court's grant of summary judgment for defendants, physician, and workers' compensation carrier, alleging malpractice and bad faith refusal to pay, respectively; the mere fact that other physicians may have disagreed with doctor's opinion that plaintiff was able to return to work was insufficient to show negligence and plaintiff failed to offer any evidence to show that workers' compensation carrier acted out of malice, with gross neglect or otherwise tortiously) 296, 315, 348-49, 352

Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 64-65, 67 (Miss. 1988) (reversed trial court's grant of summary judgment for defendant for breach of alleged oral employment contract; genuine issues of material fact existed as to length of employment contract and also as to employee's breach of fiduciary duty) 316, 332, 338, 342, 347-48

Smith v. City of West Point, 475 So. 2d 816, 817-19 (Miss. 1985) (home owner whose house was damaged when struck by police car "in hot pursuit" brought negligence action against city alleging that city was liable for police officer's negligence on basis of respondeat superior; defendant's affidavits failed to deny officer's negligence, and thus summary judgment was improper) 300-01

Smith v. First Fed. Savs. & Loan Ass'n, 460 So. 2d 786, 789-92 (Miss. 1984) (affirmed trial court's grant of summary judg-

ment for lender where lender sought deficiency resulting from unpaid note; contract was unambiguous and thus summary judgment was appropriate) 307, 312, 318,333, 348

Smith v. H.C. Bailey Cos., 477 So. 2d 224, 233-34 (Miss. 1985) (reversed trial court's grant of summary judgment for defendant in breach of contract action alleging breach of real estate listing where circumstances showed that plaintiff was not given fair opportunity to be diligent in his response to defendant's motion for summary judgment) 286, 301, 313, 327, 329, 337, 346

Smith v. Sanders, 485 So. 2d 1051, 1053-55 (Miss. 1986) (reversed trial court's grant of summary judgment for physician in medical malpractice action where material issue of fact existed as to whether patient discovered he was injured by physician's act within two-year period) 298, 313, 323, 330

Southern Farm Bureau Casualty Ins. Co. v. Brewer, 507 So. 2d 369, 370-72 (Miss. 1987) (affirmed trial court's grant of summary judgment for plaintiff; brake drum which came through plaintiff's windshield was "physical contact" as term was used in uninsured motorist policy) 298, 331

Staheli v. Smith, 548 So. 2d 1299, 1305-06 (Miss. 1989) (even though genuine issues of material fact existed as to when plaintiff discovered that he had been defamed, statements were protected by qualified privilege and thus summary judgment was properly granted) ..... *

Stamps v. Estate of Watts, 528 So. 2d 812, 813-15 (Miss. 1988) (affirmed trial court's grant of summary judgment for insurer where insured brought suit seeking punitive damages for bad faith delay or denial to pay insurance claim; no genuine issue of fact was present to establish that insurer acted in bad faith) 323

Stanton & Assocs. v. Bryant Constr. Co., 464 So. 2d 499, 504-05 (Miss. 1985) (affirmed trial court's denial of defendant's Rule 12(b)(6) motion to dismiss; refusal of trial judge to grant motion to dismiss based on grounds that complaint was vague is never appealable) 286

State ex rel. Pittman v. Ladner, 512 So. 2d 1271, 1277-81 (Miss. 1987) (affirmed chancellor's grant of summary judgment in action by state seeking to collect payments where three bids were not received on basis that operative statute was amended and individual is given benefit of prior law in effect at operative time where it is more favorable to him; reversed chancellor's determination of amount of penalty assessed under separate statute via summary judgment because full evidentiary hearing was required) ..... *

Stringer v. Bufkin, 465 So. 2d 331, 334 (Miss. 1985) (reversed trial court's grant of summary judgment for insurer in action brought by insured against his insurance agent alleging that latter had negligently failed to provide him with uninsured motorist coverage; genuine issue of fact existed as to whether or not insurance agent orally promised to bind uninsured motorist coverage) 285, 355

Terrell v. Rankin, 511 So. 2d 126, 127-29 (Miss. 1987) (reversed trial court's grant of summary judgment in medical malpractice action brought by mother for death of viable unborn eight to nine-month-old fetus; trial court abused its discretion in granting summary judgment and in declining to alter or amend the judgment upon plaintiff's motion accompanied by affidavits including that of expert witness which undoubtedly would have resulted in denial of motion for summary judgment) 307, 314

Thomas v. Munson Mach. Co., 463 So. 2d 1044, 1045-47 (Miss. 1985) (affirmed trial court's grant of summary judgment for manufacturer in action where employee of chemical company brought action against manufacturer for injuries sustained when machine manufactured by defendant accidentally started while employee was performing maintenance on it; summary judgment was proper where machine as manufactured was not defective and purchaser/employer installed electric motor and switches purchased from third-party without regard to manufacturer's instructions to install safety switch) 308, 338

Tucker v. Hinds County, No. 07-CA-59298, slip op. at 5 (Miss.

Mar. 21, 1990) (affirmed grant of summary judgment in favor of power company where any possible deprivation of due process rights of property owner resulted from actions of county) 300, 316, 331, 341

Turner v. Johnson, 498 So. 2d 389, 390-91 (Miss. 1986) (affirmed summary judgment for beauty salon owner in personal injury action where plaintiff failed to establish defect in hair dryer or negligence) 322, 331

Universal Computer Servs. Inc. v. Lyall, 464 So. 2d 69, 72 (Miss. 1985) (trial court allowed defendant to employ attorney and set aside summary judgment which had been entered) 337

Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1060-64 (Miss. 1984) (reversed trial court's grant of summary judgment in action by shareholder seeking to recover damages from bank for losses sustained as result of bank's alleged agreement to provide interim financing for corporation; genuine issue of material fact existed as to whether agreement between bank and shareholder imposed duties upon bank and as such vested rights in shareholder) 286, 290, 322, 331-32, 340, 344, 348

Walker v. Cleveland Lumber Co., 512 So. 2d 695, 696 (Miss. 1987) (reversed trial court's grant of summary judgment for merchant in action on open account where defendant filed affidavit in support of general denial) 286, 291, 295-96, 307

Walker v. Skiwski, 529 So. 2d 184, 186 (Miss. 1988) (affirmed grant of summary judgment for physician in medical malpractice action arising out of alleged negligence in performance of circumcision; plaintiff's opposition to physician's motion for summary judgment which was not based upon personal knowledge was insufficient, as was plaintiff's lack of expert medical testimony) 307-08, 310-11, 347-48

Walton v. Bourgeois, 512 So. 2d 698, 699-700 (Miss. 1987) (affirmed trial court's grant of summary judgment for physicians in action alleging breach of contract to perform surgery; patient had previously filed separate action seeking recovery but

on different legal theory and thus doctrines of res judicata and collateral estoppel barred present action) 291-92, 348

Ward v. Ford Motor Co., 484 So. 2d 363, 363-64 (Miss. 1986) (reversed trial court's grant of summary judgment where trial court granted defendant's motion for summary judgment relying on decision which was subsequently overruled) ..... *

Webster v. Mississippi Publishers Corp., No. 07-58372, slip op. at 1, 17-18 (Miss. Dec. 20, 1989) (en banc) (reversed summary disposition of negligence action seeking to hold company vicariously liable for acts of truck driver who company claimed was independent contractor; company's contractual reservation of right of control over driver's performance precluded exoneration in summary judgment) 297, 300-01, 316-17, 330-31

White v. Malone Properties, Inc., 494 So. 2d 576, 577-79 (Miss. 1986) (affirmed trial court's grant of summary judgment, holding that Louisiana's workers' compensation law provided exclusive remedy in personal injury action) 338

Willis v. Mississippi Farm Bureau Mut. Ins. Co., 481 So. 2d 256, 258 (Miss. 1985) (affirmed trial court's grant of summary judgment for insurer where insured brought action against insurer seeking to recover under automobile liability policy after policy expired when insured failed to make timely payments; provisions of contract requiring no notice of nonrenewal were clear and unambiguous, and thus summary judgment was appropriate) 297, 348

* Case reviewed but not cited in article.

A PRIMER CONCERNING INDUSTRIAL TIMBER LITIGATION WITH EMPHASIS UPON MISSISSIPPI LAW

Powell G. Ogletree, Jr.

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A PRIMER CONCERNING INDUSTRIAL TIMBER LITIGATION WITH EMPHASIS UPON MISSISSIPPI LAW

*Powell G. Ogletree, Jr.**

I. A Historical Overview and Economic Analysis of the Timber Industry in the State of Mississippi

Forests are the most valuable natural resource in the State of Mississippi.[1] Although commercial forestry enterprises had appeared in the state in the early 1800's, forest-based industries did not become important to the economy of Mississipi until the 1880's.[2] Then, during the years immediately before and after the turn of the century, capital investment in Mississippi's forest industry skyrocketed above $39 million.[3] Today, with the harvest values having topped a record $640 million in 1989,[4] the forests of Mississippi are important to its own future, as well as that of the entire South, in timber production and processing.[5]

As the lumber industry became one of Mississippi's leading enterprises, lumber companies brought new employment opportunities to the state. Such opportunities came at a price, however, and some companies involved in the production of lumber

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[1] N. Hickman, *Mississippi Forests*, in 2 History of Mississippi 212 (R.A. McLemore ed. 1973).

[2] *Id.* at 213.

[3] *Id.* at 214.

[4] Miss. Bus. J., *$640 Million in Wood* 29 (March 12, 1990); *see also Forestry Logs a Record Year in Mississippi*, The Clarion Ledger, June 25, 1989, at 1G, col. 5 (1988 harvest values were $611 million).

[5] S.H. Bullard & R.J. Moulton, The Economics of Public Assistance for Non-industrial Private Timber Sales in Mississippi 1 (Mississippi Agricultural and Forestry Experiment Station Technical Bulletin No. 147, 1988).

adopted the common practice of "cut out and get out," leaving desolation where forests had once stood and ghost towns where mills once had served as hubs to Mississippi communities.[6]

Possie N. Howell and men like him led early efforts to regenerate Mississippi forest land after the harvest of its virgin timber.[7] Howell was known for his habit of "laying claim" to any pine tree that had the makings of a good seed tree and posting signs proclaiming "Do not cut this mother tree," "Mother trees bear seed," or simply "Leave this tree."[8] His Johnny Appleseed approach to regeneration caught the eye of prominent Mississippians and led to his appointment by Governor Henry L. Whitfield in 1926 to the first Mississippi Forestry Commission.[9]

Howell achieved only limited success with his regeneration effort, however.[10] In the first two decades of the twentieth century, the disappearance of the virgin forests caused many lumber companies to take vigorous steps toward disposing of their millions of acres of denuded lands, generally by selling them to prospective farmers.[11] These farming operations largely failed, leaving unproductive agricultural lands as dead weight to their owners.[12]

The solution to the problem of vast areas of denuded, unproductive land lay in the growth of a second forest, and the state eventually took steps to encourage reforestation. The adoption of a severance tax law in 1940 established that timberlands and agricultural lands should not be taxed the same.[13] The re-

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[6] MISS. FORESTRY COMM'N, ELEMENTARY FORESTRY FOR MISSISSIPPI 6-7 (1945).

[7] *See* N. HICKMAN, *supra* note 1, at 224 (noting efforts by Mississippi companies and individuals to promote reforestation of cut-over lands).

[8] *See id.* (noting Howell's successful effort to have his employer leave one seed tree per acre to encourage reforestation).

[9] NATIONAL ASSOC. OF STATE FORESTERS, FORESTS AND FORESTRY IN THE AMERICAN STATES, 470-71 (1968).

[10] *See* N. Hickman, *supra* note 1, at 224 (noting heavy toll that wild fires, wildlife, and indiscriminate burning had on natural reforestation efforts).

[11] *Id.* at 222.

[12] *See id.* at 223 (noting that efforts by Midwestern immigrants to farm denuded lands failed because of costs of production and inability to farm land naturally suited to forest growth).

[13] Prior to the adoption of severance tax laws, real property was assessed "according to its true value, taking into consideration the improvements and timber thereon." MISS. CODE ANN. § 3145 (1930). With the adoption of severance taxes in 1940, the taxing of

peal of ad valorem taxes on timber, the low assessment of timberlands, and the taxing of timber only when severed from the land combined to create an opportunity for industrial forestry companies to enter once again into land ownership.[14]

Following World War II, the growth of the pulp and paper industry was important to the economy of the state.[15] Favorable tax laws created an environment in which it was economically possible for industrial forestry companies to regenerate formerly unproductive lands.[16] By the 1950's, this regeneration effort was partially responsible for the reversal of the historical trend of drain which exceeded growth.[17] The impact of industrial forestry upon the economy of the state was easily recognized in the 1950's. By 1956, one-half of all workers in the state were employed in some phase of forestry or forestry-based industries.[18] Mississippi's paper mills produced paper valued at $50 million and consumed in excess of 2,000,000 cords of wood acquired at a price exceeding $32 million.[19]

This trend continued into the 1960's. By 1962, forest industries owned more than twenty percent of the forest land in twenty of Mississippi's 82 counties.[20] Well known industrial for-

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timber was deferred until it was severed from the land. *See* MISS. CODE ANN. § 9406 (1942) (requiring value of timber to be computed as of date of severance in unmanufactured state).

[14] N. HICKMAN, *supra* note 1, at 225.

[15] *See id.* at 227-28 (noting that lower power costs, cheap labor, modern plants and increased product demands stimulated expansion of paper industry).

[16] *Id.* at 227.

[17] *Id.* at 228. Drain is generally defined as the annual loss "in growth stock on commercial forest land due to volume removal through cutting, fire, or natural causes." SOCIETY OF AMERICAN FORESTERS, FOREST TERMINOLOGY 26 (3d ed. 1964). Conversely, growth denotes an increase in growth stock over a given period of time and can be measured by an increase in diameter, basal area, height, volume, quality or value of individual trees or stands. *Id.* at 42.

The trend of growth exceeding drain was apparent throughout the Southeast, including Mississippi. N. HICKMAN, *supra* note 1, at 228. In addition to regeneration, other causes of this reversal included a decreased demand for timber logs and utilization of waste products through paper manufacturing. *Id.*

[18] N. HICKMAN, *supra* note 1, at 228.

[19] *Id.* A cord is a unit of measurement of stacked wood. A standard cord contains 128 cubic feet, and its dimensions are four by four by eight feet. SOCIETY OF AMERICAN FORESTERS, *supra* note 17, at 18.

[20] SOUTHERN FOREST EXPERIMENT STATION, MISSISSIPPI FOREST ATLAS 11 (1962).

estry corporations such as Georgia Pacific, Weyerhaeuser Corporation, St. Regis Paper Company, and International Paper Company extended their land holdings and plants.[21] Although lumber production still remained first among forest industries, paper mills made significant inroads into timber industry production, as evidenced in their consumption of approximately forty-eight percent of the timber harvested in 1959.[22]

The forest industry continued to shine in the state's development through the 1970's and 1980's. In the years from 1982 to 1987, 570 new or expanding forest-related industries added over 17,000 jobs to the Mississippi economy and boosted new investments in the state to more than $672 million.[23] Forest industries contributed over $1 billion to the state's economy in 1987,[24] and Mississippi's annual tree harvests continue to set record-breaking figures. The projected demand for Mississippi forest products continues to rise because of the fiber needs of mills, factories, and other industries in Mississippi and neighboring states, as well as in foreign countries.[25]

From the late nineteenth century to the present, Mississippi's economy has grown increasingly dependent upon timber and timber-based activities.[26] Although forest products were second only to cotton in producing the highest crop value during 1988, the net profit from trees exceeded that of any other crop in the state.[27] With 56% of the state's land occupied by forested acreage, the forest economy has a firm base on which to grow raw material and provide stability to the state's total economic outlook for the future.[28]

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[21] N. HICKMAN, *supra* note 1, at 230.

[22] *Id.*

[23] Mississippi Forestry Commission, *Forest Industry: Shining Star in State's Development*, FORESTRY FORUM, Winter 1988, at 4.

[24] *Id.*

[25] *Forestry Logs a Record Year in Mississippi*, *supra* note 4.

[26] MISS. FORESTRY COMM'N, FACTS AT A GLANCE, 4 (1988). Forest industries in Mississippi have income and employment multipliers averaging 20% greater than other sections of the economy. Flick, *The Wood Dealer System in Mississippi*, 29 J. FORESTRY HIST. IND. 138 (July 1985). The expansion of forest industries has a ripple effect upon the entire state's economy due to their economic link with other aspects of Mississippi life, including their purchase of raw materials from other Mississippi industries. *Id.* at 138.

[27] *Forestry Logs a Record Year in Mississippi*, *supra* note 4.

[28] MISS. FORESTRY COMM'N, *supra* note 26. A recent examination of the present and

II. A Survey of Industrial Forestry Companies Concerning Timber Litigation

Assuming a predominant role in the state's economy forces the forest industry to face business problems in the potential for litigation that have also affected other industrial leaders. Almost three-fourths of the approximately 200,000,000 acres of commercial forest land in the South are owned by private individuals.[29] Mississippi is typical of its sister states in that most of its timberland is also owned by private individuals.[30] A fact of economic reality is that industrial forestry companies will choose to manage large numbers of timberland acres in order to supply their raw material needs, thereby placing themselves across the negotiating table from Mississippians for many years to come. Similarly, the vast quantities of acreage owned by industrial forestry companies create the possibility of a wide variety of disputes that can arise with neighboring landowners.

In an effort to determine the legal issues that face industrial forestry companies, the author conducted an informal survey in June of 1989 of 157 entities (108 members) listed in the January, 1989 *Timber Harvesting* "Woodlands Directory."[31] The survey was not designed to obtain any degree of statistical accuracy, but rather to serve as a forum for receiving input from industrial forestry companies as to their views involving timber litigation issues. The inclusion of particular issues in this paper results from frequent mention by those respondents who managed timberlands in the State of Mississippi.[32] Certain issues receive

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future prospects of forestry in Mississippi resulted in the publication of a special section of the *Mississippi Business Journal* entitled "Forestry in Mississippi."

[29] H.L. Williston, W.E. Balmer, & D.H. Sims, Managing the Family Forest in the South 1 (U.S. Department of Agriculture Management Bulletin R8-MB, 1988).

[30] S. H. Bullard & R. J. Moulton, *supra* note 5.

[31] The survey was conducted solely for use in connection with this paper, and participants were informed that composite information would be utilized for this purpose. Replies to the survey were solicited with the understanding that responses would be kept confidential. A copy of the survey sent to directory members is included in the Appendix.

[32] Of the 108 members of the "Woodlands Directory" contacted, 46 (42.6%) responded. Issues included in this paper were those receiving a 50% or better combined rating of F (frequent) or S (seldom) based on a weighted average of acres in the state controlled by individual respondents. Other issues have been included at the author's

only superficial treatment because of their complexity and breadth; other issues lend themselves to more detailed treatment. Current issues and recent developments in Mississippi law have been given special emphasis.

III. Industrial Timber Litigation Issues

A. Independent Contractors

There are two primary areas of dispute pertaining to the status of persons as either independent contractors or employees of industrial forestry companies. One involves negligence claims by third parties against the forestry company; the second involves claims by the injured worker under the Workers' Compensation Act. In both situations the industrial forestry company has traditionally asserted that the individual who caused the injury or the one who was injured was an independent contractor, not an employee.

The status of the worker as an employee or independent contractor turns on the facts and circumstances of each case. In reaching this decision, the court will consider such factors as the following: whether the company has the power to terminate the contract at will, to fix the price for the work, or control the manner and time of payment; who furnishes means and appliances for the work, controls the premises, furnishes materials upon which the work is done, and receives the output of the work; who has the right to prescribe the kind and character of work, to supervise and inspect the work, to direct the manner in which the work is to be done, to employ and discharge sub-employees, and to fix their compensation; and who is obligated to pay the wages of the employees.[33]

Claims by third parties against industrial forestry companies frequently arise from automobile accidents involving persons engaged to cut and haul wood. Broken down pulpwood trucks left after dark on the highway with no lights[34] and jack-

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discretion.

[33] Kisner v. Jackson, 159 Miss. 424, 428-29, 132 So. 90, 91 (1931).

[34] *See* Hobbs v. International Paper Co., 203 So. 2d 488, 489 (Miss. 1967).

knifed pulpwood trucks blocking the highway at night without flares, flashlights or warning devices[35] create the possibility of litigation against industrial forestry companies.[36] If the truck driver or truck owner is found to be an independent contractor, the employer is not liable for his negligence. If, however, the driver or owner is determined to be an employee rather than an independent contractor, the law of principal and agent will hold the employer liable for an employee's negligence committed during the course of and within the scope of his employment.[37]

Obviously, a contract between the worker and the forestry company setting out the relationship of the parties and reflecting that the forestry company does not have control over the worker is a good preventive action for any forestry company to take. Yet, while the contract is relevant to the issue of the legal relationship between the company and the worker, courts have expressed their desire to "look at the transactions in their actual character, piercing through the screen of technical attitudes to what are the realities . . . regard[ing] substance rather than formal similitudes."[38]

A determination of whether or not a worker is an independent contractor frequently arises in the context of workers' compensation claims by injured workers. For purposes of the Workers' Compensation Act, an "independent contractor" is defined as:

> Any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the result of the work, and who has the right to employ and direct the outcome of the workmen independent of the employer and free from any superior or authority in the employer to see how the specified work shall be done or what the laborers shall do as the work pro-

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[35] *See* Leaf River Forest Prods. v. Harrison, 392 So. 2d 1138, 1139 (Miss. 1981).

[36] *See* Powell v. Masonite Corp., 214 So. 2d 469, 470 (Miss. 1968) (holding that truck driver was not agent of defendant at time of accident despite fact that truck driver was purchasing truck from defendant by having money regularly deducted from wages received from defendant).

[37] Blackmon v. Payne, 510 So. 2d 483, 488 (Miss. 1987).

[38] *Leaf River Forest Products*, 329 So. 2d at 1141 (citing Hederman v. Cox, 188 Miss. 21, 40, 193 So. 19, 24 (1940)).

> gresses; one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result.[39]

The Workers' Compensation Act has been liberally construed in favor of the claimant in order to carry out the essential purposes of the Act.[40] In reaching a determination as to whether at any given time a worker is an independent contractor or employee, the courts apply the primary test of who had "the *right* to control, not actual control of, the details of the work."[41]

Industrial forestry companies would be well advised to develop a standard contract for use with independent contractors which specifically notes that workers are not subject to the company's control and that the independent contractor should carry his own workers' compensation insurance.[42] In a close case, such a contract itself could provide the winning edge to the industrial forestry company.[43]

The language of the contract will not generally be dispositive on the issue of the relationship of the parties. If an industrial forestry company requires its contractors to provide insurance and yet is aware that this requirement is not being met, the court may find that the injured party is an employee and hold that the company is estopped from denying workers' compensation liability.[44] Similarly, regardless of the contractual relation-

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[39] MISS. CODE ANN. § 71-3-3(r) (1972).

[40] Champion Cable Constr. Co. v. Monts, 511 So. 2d 924, 928 (Miss. 1987); *see also Leaf River Forest Products*, 392 So. 2d at 1140 (noting that evidence in workers' compensation cases is liberally construed in favor of claimants in order to carry out beneficent purposes of Act).

[41] Georgia-Pacific Corp. v. Crosby, 393 So. 2d 1348, 1349 (Miss. 1981) (citing Boyd v. Crosby Lumber & Mfg. Co., 250 Miss. 433, 440, 166 So. 2d 106, 108 (1964)) (emphasis added). In *Georgia-Pacific*, the court held that the four principal factors to be considered under the control test are the right to exercise control, method of payment, furnishing of equipment, and right to fire. *Id.* (citing *Boyd*, 250 Miss. at 440, 166 So. 2d at 108).

[42] *See Leaf River Forest Products*, 392 So. 2d at 1138. *But see* Brown v. E.L. Bruce Co., 253 Miss. 1, 8, 1 So. 2d 151, 156 (1965) (holding contract hauler entitled to compensation despite terms of written contract since hauler's business had meshed with and become integral to employer's business).

[43] *See* Hutchinson-Moore Lumber Co. v. Pittman, 154 Miss. 1, 13, 112 So. 191, 193 (1929) (holding that provisions of contract established that injured worker was independent contractor).

[44] *Champion Cable Constr. Co.*, 511 So. 2d at 927-29.

ship between the parties, the company would be best advised not to become intimately involved in the business practice of individual third party contractors. If it does so the court may find employment based on the entire relationship between the parties.[45]

B. The Migrant and Seasonal Agricultural Worker Protection Act

In 1964, the United States Congress adopted the Farm Labor Contractor Registration Act[46] (FLCRA), which was designed to regulate independent middlemen who supplied laborers to agricultural concerns across the nation and were in a position to exploit both operators and workers. Subsequent amendments to FLCRA spawned a flood of litigation, which ultimately led to the enactment of the Migrant and Seasonal Agricultural Worker Protection Act[47] (MSPA) in 1983. MSPA is a comprehensive federal statute requiring employers of migrant and seasonal farm workers to comply with various record-keeping and disclosure requirements.[48]

The traditional interpretation of the Department of Labor has been that forestry workers were not engaged in "agricultural employment" within the meaning of MSPA.[49] The first hint that

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[45] An example of excessive involvement in the business practices of third party contractors is provided in Brown v. L.A. Penn & Son, 227 So. 2d 470 (Miss. 1969). In *Brown*, a timber purchaser co-signed notes, sold parts to, and paid for repairs for wood haulers so that the haulers could continue delivering wood to the purchaser as needed. *Brown*, 227 So. 2d at 471. The court ultimately held that the haulers were subject to the control of the timber purchaser and thus did not constitute independent contractors. *Id.* at 474. Therefore, the purchaser was liable under the Workers' Compensation Act for injuries to the haulers. *Id.*

[46] 7 U.S.C. § 2041 (repealed 1983).

[47] 29 U.S.C. §§ 1801-1872 (1983).

[48] Note, *The Joint Employer Doctrine Under the Federal Migrant and Seasonal Agricultural Workers Protection Act*, 18 RUTGERS L.J. 863 (1987); *see also* 29 U.S.C. § 1801 (1982) (noting that purposes of MSPA are to remove restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers, to require farm labor contractors to register under Act, and to assure necessary protection for migrant and seasonal agricultural workers and employers).

[49] Bracamontes v. Weyerhaeuser Co., 840 F.2d 271, 276 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 219 (1989).

The term "agricultural employment" is defined under MSPA to include activity under certain provisions of the Fair Labor Standards Act, 26 U.S.C. § 3121(g) (1982), as

migrant agricultural worker laws might be applied to the forestry industry came in dicta in a 1983 Eleventh Circuit decision dealing with FLCRA, the predecessor of MSPA.[50] Four years later, the issue of whether MSPA applied to migrant and seasonal commercial forestry workers was squarely faced by the United States Court of Appeals for the Ninth Circuit in *Bresgal v. Brock*.[51] In *Bresgal*, the court held that, while forestry workers are not commonly viewed as agricultural workers, those who "raise trees as a crop for harvest are engaged in agricultural employment for the purposes of [MSPA]."[52] The court affirmed the decision of the district court, only modifying its injunction against William Brock, Secretary of Labor. It enjoined him and his successors from refusing to enforce MSPA as to "recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal worker for all predominantly manual forestry work, including but not limited to tree planting, brush clearing, pre-commercial tree thinning and forest fire fighting."[53]

In *Bracamontes v. Weyerhaeuser Company*,[54] the United States Court of Appeals for the Fifth Circuit, stating that it "joined the Ninth and Eleventh Circuits," applied federal migrant protection laws to the forestry business.[55] Although the court noted the Department of Labor's position that forestry workers did not perform agricultural employment within the meaning of MSPA and stated that the argument was one with considerable force, the court reviewed the legislative history of the 1974 amendments to the FLCRA and held that Congress intended that agricultural employment include forestry operations even when not performed on a traditional farm.[56] The court spe-

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well as "the handling, planting, drawing, packing, packaging, processing, freezing or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state." 29 U.S.C. § 1802(3) (1982).

[50] Davis Forestry Corp. v. Smith, 70 F.2d 1325, 1328 n.3 (11th Cir. 1983).

[51] Bresgal v. Brock, 833 F.2d 763, 771 (9th Cir. 1987), *modified*, 843 F.2d 1163 (9th Cir. 1988); *see* Dingfelder, *1983 Migrant and Seasonal Agricultural Workers Act Results in a Harvest of Litigation Ripe for the Picking*, 5 LAB. LAW. 239 (1989).

[52] *Bresgal*, 843 F.2d at 1166.

[53] *Id.* at 1172.

[54] 840 F.2d 271 (5th Cir. 1988).

[55] *Bracamontes*, 840 F.2d at 274.

[56] *Id.* at 276.

cifically referred to a 1974 United States Senate report indicating that the provisions were intended to apply to contractors, including those who regularly employ illegal aliens as "tree planters, thinners, and other forest laborers."[57] Accordingly, the court reversed the district court's grant of a motion to dismiss in favor of Weyerhaeuser[58] and remanded to the lower court the issue of whether Weyerhaeuser should be enjoined from using farm labor contractors until the company had registered with the Department of Labor as required by MSPA.[59]

Unless an industrial forestry company is found to be a joint employer under MSPA,[60] its only obligation should be to verify that its independent contracts are registered with the Department of Labor for each farm labor contracting activity performed by the contractor.[61] Farm labor contracting activities are defined under MSPA as "recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal agricul-

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[57] *Id.* at 274 (*citing* S. REP. No. 1295, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6441, 6444).

[58] The district court's ruling was based upon its conclusion that the *Bracamontes* case was factually indistinguishable from Aguirre v. Davis Forestry Corp., No. B-81-142 (S.D. Tex. Mar. 13, 1987), in which the court decided that FLCRA could not apply to parties engaged exclusively in forestry activities.

[59] *Bracamontes*, 840 F.2d at 272. 29 U.S.C. § 1811 (1982) requires any person engaged in farm labor contracting activities to register with the Secretary of Labor. *Id.*

[60] The term "employ" as used in MSPA is defined as having the same meaning as provided under the Fair Labor Standards Act of 1938. 29 U.S.C. § 1802(5) (1982). Other regulations enacted pursuant to MSPA have further demonstrated congressional intent to adopt the joint employment principles applicable under the Fair Labor Standards Act. Note, *supra* note 48, at 867 (citing 29 C.F.R. § 500.20(h)(4) (1989)). If a forestry company is held to be a joint employer of the migrant or seasonal worker, it would be responsible for full compliance with the Act. *Cf.* Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 238 (5th Cir.) (farmer and crew leader held to be joint employees rather than having contractor-independent contractor relationship), *cert. denied*, 414 U.S. 819 (1973). Five factors have been used as guidelines in determining whether an independent contractor or joint employer situation exists: (1) whether or not employment takes place on the premises of the company; (2) how much control the company exerts over employees; (3) whether the company has the power to fire, hire, or modify conditions of employment; (4) whether employees perform a specialty job within a production line; and (5) whether the employees may refuse to work for the company or work for others. Note, *supra* note 48, at 867; *see also* Linder, *Employees, Not-so Independent Contractors and the Case of Migrant Farm Workers: A Challenge to the "Law and Economics" Agency Doctrine*, 15 REV. L. & SOC. CHANGE 435 (1986-87).

[61] 29 U.S.C. § 1802(6) (1982).

tural worker."[62]

The enforcement provisions of MSPA include criminal sanctions of up to $10,000 and a three-year prison term,[63] injunctive relief by the Secretary of Labor,[64] private suits by injured persons for actual damages or statutory damages of up to $500 per plaintiff per violation, with a $500,000 limit on class action relief,[65] and administrative sanctions of not more than $1,000 for each violation.[66] The private action relief can include the appointment of an attorney to represent a class and payment of attorneys' fees.[67]

C. *Best Management Practices*

The 1948 Federal Water Pollution Control Act[68] (Clean Water Act) was recently amended by the Water Quality Act of 1987.[69] The Water Quality Act requires each state to submit a management program aimed at controlling pollution added to navigable waters from non-point sources.[70] Surface runoff from

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[62] *Id.* § 1851.

[63] *Id.* § 1852.

[64] *Id.* § 1854.

[65] *Id.*

[66] *Id.* § 1853(1).

[67] *Id.* § 1854(b).

[68] 33 U.S.C. §§ 1251-1337 (1982 & Supp. 1989). The original Clean Water Act has been amended extensively, with amendments occurring in 1972 (Federal Water Pollution Control Act Amendments of 1972), 1977 (Clean Water Act of 1977), 1981 (Municipal Waste Water Treatment Construction Grant Amendments of 1981) and 1987 (Water Treatment Act of 1987).

[69] 33 U.S.C. § 1329 (Supp. 1989).

[70] 30 U.S.C. § 1329(b)(1) (Supp. 1989). Point source pollution is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (Supp. 1989). Non-point source pollution is any pollution whose specific point of generation and point of entry into a water course cannot be determined. MISS. FORESTRY COMM'N, MISSISSIPPI'S BEST MANAGEMENT PRACTICES HANDBOOK 1 (Apr. 1989).

Navigable waters are defined as the "waters of the United States including territorial seas." 33 U.S.C. § 1362(7) (1976). The term was been interpreted as indicating the intent of Congress to use the full extent of its commerce power in order to achieve the "broadest possible constitutional interpretation." United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979). Because the Clean Water Act has been held to authorize the Corps of Engineers to regulate discharges into navigable waters and their adjacent wetlands, many forestry activities conducted in low-lying areas or river and tributary bottomlands are subject to the Act. *Cf.* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121,

silvicultural land arising out of forestry activities qualifies as non-point pollution.[71] The Water Quality Act anticipated the involvement of local, public, and private agencies and organizations having expertise and control of non-point sources of pollution in preparation for the state management program.[72]

The Environmental Affairs Committee of the Mississippi Forestry Association[73] developed the Best Management Practices Handbook utilized by the State of Mississippi.[74] The term "best management practice" is defined in the Mississippi handbook as "a practice, or combination of practices that is determined to be the most effective, practical means of preventing or reducing the amount of pollution generated by non-point sources to a level compatible with water quality goals."[75] The handbook also recommends best management practices for Mississippi's climate, soils, and topography, recognizing that such determinations must apply sound conservation principles consistent with economic objectives to minimize water pollution.[76] In addition, the handbook contains definitions and specific guidelines for such forest activities as woodland access to roads and trails, site preparation, tree planting, pesticide use control, forest harvesting, revegetation, and filter strips.[77]

Compliance with best management practices is, as a general rule, voluntary. Adherence to such practices may be mandatory, however, if a forestry company is relying upon the Clean Water Act's "agricultural exemption"[78] from obtaining a permit for the discharge of dredged or fill material for the purpose of constructing or maintaining forest roads. Under the exemption,

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134 (1985) (enjoining development company from placing fill materials on wetland adjacent to navigable waters).

[71] MISS. FORESTRY COMM'N, *supra* note 70.

[72] 33 U.S.C. § 1329(b)(3) (Supp. 1989).

[73] The Mississippi Forestry Association was formed on June 10, 1938, by a group of dedicated citizens who banded together to establish a statewide organization for the advancement of intelligent management and use of forestry, soil, water and wildlife resources. NATIONAL ASSOC. OF STATE FORESTERS, *supra* note 9, at 475.

[74] MISS. FORESTRY COMM'N, *supra* note 70.

[75] *Id.*

[76] *Id.* at 1-2.

[77] *See id.* at 4, 6-31.

[78] 33 U.S.C. § 1344(f)(1)(E) (1982).

such a discharge must be undertaken "in accordance with best management practices" and in a manner that does not impair the flow, circulation patterns, or biological characteristics of navigable waters.[79]

In *United States v. Akers*,[80] the court upheld an injunction obtained by the Corps of Engineers that prohibited a farmer from depositing dredge or fill materials into wetlands.[81] The ruling was based upon the court's finding that the road constructed over the overflow channels of the Pit River failed to comply with best management practices and that the farmer was not entitled to exemption from a permit under the "agricultural exemption" to the Clean Water Act.[82]

Similarly, if an industrial forestry company chooses to rely upon the agricultural exemption and does not obtain a permit from the Corps of Engineers, it must construct any forestry roads in low-lying areas, for harvesting or other silvicultural activities, in accordance with best management practices. In choosing a course of action, forestry companies should be aware that the Courts of Appeal for the Fifth and Seventh Circuits have narrowly construed the agricultural exemption to the Clean Water Act.[83]

Voluntary adherence to best management practices will not automatically assure compliance with state water quality standards. In *Northwest Indian Cemetery Protective Association v. Peterson*,[84] environmentalists successfully brought suit against the United States Forest Service, contesting the Forest Service's plans to permit timber harvesting and road construction in national forests.[85] The government argued that the standards es-

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[79] *Id.*; *see* 40 C.F.R. §§ 232.2(d), 232.3 (1989) (defining best management practices and setting forth certain activities not requiring permits for discharge).

[80] 785 F.2d 814 (9th Cir. 1986).

[81] *Akers*, 785 F.2d at 821.

[82] *Id.* at 820-21. The farmer admitted that significant "hydrological alteration" of the wetland area would be the direct result of his proposed farming activities. *Id.* at 820.

[83] *Id.* at 819 (citing United States v. Huebner, 752 F.2d 1235, 1240-41 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 925 n.44 (5th Cir. 1983)).

[84] 764 F.2d 581 (9th Cir. 1985).

[85] *Peterson*, 764 F.2d at 584-85. The *Peterson* case also presented issues concerning the "free exercise clause" of the first amendment and federal use of certain tribal burial

tablished in the California Water Quality Plan were no longer applicable to the Forestry Service because those standards had been superseded by Best Management Practices (BMP's) that had been accepted by the state of California and the Environmental Protection Agency.[86] While the BMP's would not be violated by the proposed timber harvesting and road construction, the court rejected the argument that these were the only standards to be met.[87] Instead, the court held that the BMP's were merely one method of achieving the appropriate state water quality standards.[88] Because the Forest Service projects would violate the state water quality plan, adherence to BMP's would not insulate the project from the state plan requirements.[89]

D. Trespass to Timber

Any person who cuts down trees belonging to another without the consent of the owner is guilty of trespass to timber.[90] Liability for such actions is imposed by both statute and common-law tort principles.[91] In 1989, the Mississippi Legislature radically changed the statutes dealing with civil damages for the wrongful cutting of timber.[92] Because the bill is applicable only to causes of actions accruing on or after July 1, 1989, any action for trespass to timber occurring before that date would be gov-

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grounds. *Id.* at 585-86.

[86] *Id.* at 588-89.

[87] *Id.* at 588.

[88] *Id.* The court held that the Best Management Practices defined in federal regulations did not constitute "standards in and of themselves." *Id.*

[88] *Id.*

[90] *Id.* at 588-89.

[91] In addition to civil liability, a person who knowingly, willfully and feloniously takes, steals, or carries away timber whether growing, standing or lying on the lands can be criminally prosecuted. *See* MISS. CODE ANN. § 97-17-59 (1972) (setting forth criminal penalties for trespass to timber including imprisonment of up to five years and fines up to $500.00 where value of trees exceeds $25.00); *see also id.* § 97-17-81 (cutting or rafting trees or timber of certain species belonging to another subjects wrongdoer to maximum sentence of five months and $1,000.00 fine); *id.* § 97-17-89 (person who unlawfully severs, destroys, carries away or injures any tree where such action is not larceny shall be guilty of misdemeanor and subject to six months in jail and $500.00 fine); *id.* § 97-17-15 (altering or destroying boundary trees is criminal offense).

[92] *See* Act of April 19, 1989, ch. 558, 1989 Miss. Laws 741-42 (codified at MISS. CODE ANN. § 95-5-10 (Supp. 1989) (repealing prior statutes which had expressly provided damage amounts and establishing sanctions based on harm suffered by landowner)).

erned by the former statutes.[93]

1. Actions Prior to July 1, 1989

Before the 1989 legislation, any person who cut down, destroyed or carried away a tree[94] owned by another was liable for a statutory penalty of $35 to $55 per tree, depending upon the variety of the tree involved.[95] In the recent case of *Berry v. Player*,[96] the Supreme Court of Mississippi affirmed a trespass judgment against the defendants for $8,803 in actual damages and $71,225 in statutory damages.[97] The *Berry* court noted that good faith was a defense to imposition of the statutory penalties. However, the Mississippi court has traditionally construed this defense narrowly. As the court noted in a previous decision:

> [D]ue and proper regard for the property of another requires of any person, before he engages in the deliberate act of cutting or destroying a tree, to take whatever precaution and safeguards as are reasonably necessary . . . to assure himself that he has the lawful authority to do so. If he fails to take such necessary steps he can hardly claim he has acted in good faith.[98]

When suit was brought under a common-law tort of trespass or conversion and the cutting of the tree was willful, the guilty party was statutorily liable to the owner for the delivered value of the timber.[99] Furthermore, a good faith purchaser of the timber who bought it from the willful treapasser was statutorily liable to the rightful owner for the delivered value.[100] Where trees

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[93] *Id.*

[94] MISS. CODE ANN. §§ 95-5-1 to -5 (1972) (repealed 1989). The repealed statutes set forth specific penalties for the wrongful cutting of only the types of trees enumerated in the statutes. *Id.*

[95] *Id.*

[96] 542 So. 2d 895 (Miss. 1989).

[97] *Berry*, 542 So. 2d at 901. The court held that questions of ownership of timber must be resolved in "the supposed owner's favor prior to picking up the ax or cranking up the chain saw." *Id.* at 900 (citing Grisham v. Hinton, 490 So. 2d 1201, 1205 (Miss. 1986)).

[98] Grisham v. Hinton, 490 So. 2d 1201, 1205 (Miss. 1986).

[99] Masonite Corp. v. Williamson, 404 So. 2d 565, 568 (Miss. 1981).

[100] *Masonite Corp.*, 404 So. 2d at 568-69.

had been cut and removed by mistake or inadvertence, however, the statute imposed liability upon the negligent party for the "stumpage value" only.[101] Stumpage value was the value of the standing trees unenhanced by the labor of the trespasser.[102]

2. Actions from and After July 1, 1989

The current statutes apply to actions accruing from and after July 1, 1989. The bill adopted by the legislature was originally proposed by the legislative committee of the Mississippi Forestry Association.[103] The Mississippi Legislature received further input from private landowners as well as industrial forestry companies in making minor revisions to the original version.[104] The current statutes abolish the good faith defense and impose strict liability upon a person who wrongfully cuts timber.[105] However, the revised statutes continue to make a distinction as to whether a wrongful cutting was willful. Although any wrongful cutting subjects the timber trespasser to damages of double the fair market value of the tree, plus reforestation costs of up to $250 per acre,[106] an additional penalty of up to $55 per tree will be imposed upon the willful trespasser.[107] In addition to statutory damages,[108] the court also has discretion to assess rea-

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[101] *Id.* at 568.

[102] *Id.* (citing Chevron Oil Co. v. Snellgrove, 253 Miss. 356, 364, 175 So. 2d 471, 474-75 (1965)).

[103] Telephone interview with Senator Cecil Mills of Greene County, Mississippi, Chairman of the Forestry Committee (Sept. 18, 1989).

[104] *Id.* One example of the changes made by the legislature to the bill as originally submitted was the addition of the $250 cap on the cost of reforestation.

[105] MISS. CODE ANN. § 95-5-10 (Supp. 1989). In order to prove a prima facie case under the new act, a plaintiff is required to show that he is the owner of the timber and that the timber was cut down, deadened, destroyed or taken away by the defendant, his agents, or his employees without his consent. *Id.*

[106] *Id.*

[107] *Id.* If the person wrongfully cutting, deadening, or destroying the tree did so willfully, or in reckless disregard of the rights of the owner, in addition to these damages, that person must pay the owner an additional penalty of $55 for every tree that is 7" or more in diameter, 18" above the ground, or $10 for every tree less than 7" in diameter, 18" above the ground. *Id.* In order to recover damages for willful conversion, the owner must establish that the defendant or his agents or employees acting under the command or consent of their principal willfully and knowingly, in conscious disregard of the rights of the owner, cut down, deadened or destroyed the tree. *Id.*

[108] *Id.* The damage remedies provided in this statute are in lieu of any other com-

sonable expert witness and attorneys' fees as court costs.[109]

Many trespass to timber cases arise out of disputes over ownership of the property on which timber is cut. Therefore, great care must be taken by any person who cuts trees to clearly establish title to the property and the exact boundaries of the land. Under both the former and present Mississippi statutes concerning trespass to timber, failure to ascertain boundaries can result in liability for statutory penalties as well as actual and punitive damages.[110]

E. Claims of Negligence or Nuisance Pertaining to Timber Ownership and Operations

1. Damage or Destruction Caused by Fire

The negligent or intentional destruction of timber by fire[111] gives rise to both civil and criminal liability on the part of the person responsible for setting the fire.[112] Basic statutory provisions establish that any person who sets fire to the land of another or who wantonly or negligently allows fire to damage such land will be liable for the destruction of trees, timber, grass, buildings, fences and the like.[113] In addition, a penalty of $150 will be levied in favor of the owner.[114] Under both statutory law and general principles of negligence, any person who sets a fire

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pensatory, punitive, or exemplary damages for the cutting down, deadening or destroying or taking away of the tree but do not limit actions or awards for other damages caused by the person. *Id.*

[109] *Id.*

[110] Shell Oil Co. v. Murrah, 493 So. 2d 1274, 1275-76 (Miss. 1986); Day v. Hamilton, 237 Miss. 472, 478, 115 So. 2d 300, 303 (1959).

[111] The term "fire" in this section refers to "wildfire" only and does not include prescribed burning. Mississippi has historically been plagued with wildfire. Some landowners burned off woodlands each year to have an early pasture for livestock or to kill snakes, ticks, boll weevils and other pests or insects. Hunters have burned the woods to drive out game. Others set fires "just for fun." MISS. FORESTRY COMM'N, *supra* note 6, at 87-92. Thirty-four of Mississippi's 82 counties have been classified as having a "very high" rate of fire occurrence. SOUTHERN FOREST EXPERIMENT STATION & SOUTHEASTERN FOREST EXPERIMENT STATION, A FOREST ATLAS OF THE SOUTH 27 (1969).

[112] *See, e.g.*, MISS. CODE ANN. § 49-19-25(a) (1972) (classifying negligent setting of fire as public nuisance); *id.* § 95-5-25 (setting forth civil penalties for wanton and negligent setting of fires); *id.* § 97-17-13 (setting forth criminal penalties for timber arson).

[113] § 95-5-25.

[114] *Id.*

on his own property, even for a lawful purpose, is liable for any damages caused by the spread of the fire to property of another where he has been guilty of negligence in starting the fire or in guarding against its spread.[115]

In addition to holding the negligent party liable for both actual damages and the general statutory penalties, Mississippi statutes provide that any uncontrolled fire on forested or cut-over lands, or brush or grass lands is a public nuisance.[116] If the person responsible for the fire fails to control or extinguish it immediately, he is liable for the costs of abating the nuisance as well as court costs and attorneys' fees.[117]

Any person who willfully or maliciously sets fire to "woods, meadow, marsh, field or prairie" belonging to another is guilty of arson, a felony which carries a sentence of one or two years imprisonment and/or a fine of $200 to $1,000.[118] Any such fire caused by recklessness or gross negligence is a misdemeanor and subjects the guilty party to a fine of $20 to $500 and/or three months in the county jail.[119]

Clearly, any person or corporation who undertakes to start a fire on his property must exercise reasonable care to prevent damage to adjoining lands. To do otherwise invites civil or criminal liability based upon general principles of negligence and violations of Mississippi statutory law.

2. Liability for Trees in or near Roadways, Streams or Navigable Waters

Mississippi statutes provide that any person who fells a tree into or otherwise obstructs any public highway, road or navigable water[120] without immediately removing it may be assessed the cost of removal[121] and subject to criminal prosecution.[122] Ob-

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[115] Wofford v. Johnson, 250 Miss. 1, 4, 164 So. 2d 458, 459 (Miss. 1964).

[116] Miss. Code Ann. § 49-19-25(a) (1972).

[117] *Id.*

[118] § 97-17-13.

[119] *Id.*

[120] *See id.* § 1-3-31 (defining navigable waters as "[a]ll rivers, creeks and bayous . . . twenty-five miles in length, and having sufficient depth and width . . . to float a steamboat with carrying capacity of two-hundred bales of cotton").

[121] § 65-7-7. A civil action for the costs of removal may be brought before any justice

structing streams and canals also constitutes a criminal offense subjecting the offender to fines and imprisonment.[123]

In *Georgia Pacific Corp. v. Armstrong*,[124] an upper riparian landowner called the court's attention to a statute making it a crime for a person or corporation to "push, fell or cut trees, logs or treetops" in excess of six inches in diameter into a running stream where such objects materially impede the flow or navigation upon the stream.[125] The chancellor personally viewed the lands and found that Georgia Pacific's logging operations on the lower riparian owner's land were the proximate cause of flooding on the upper riparian owner's land.[126] He concluded that the operations violated a common-law duty to conduct logging operations in a manner that did not create a nuisance such as excess flooding.[127] The chancellor awarded damages in the amount of $12,000 and issued an injunction requiring defendants to remove from the stream all obstructions that were the result of defendant's logging operations and to restore the canal to its condition prior to the cutting of timber.[128]

Dead or dangerous trees near any public road that endanger public travel may be removed by the board of supervisors of any county if the owner refuses to do so himself.[129] The value of the trees or timber will be assessed and paid by the county to the owner.[130] If the owner is dissatisfied with the assessed value, he must appeal to the circuit court within five days of receipt of the

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court judge. *Id.*

[122] § 97-15-39. Convictions for obstructing a public highway may subject the offender to one week's imprisonment or a $50 fine. *Id.*

[123] *See id.* (felling tree into and obstructing stream or canal not less than 150 feet wide is misdemeanor punishable by $50 fine or imprisonment of not more than week); § 97-15-41 (pushing, felling or cutting trees, logs, or treetops in excess of 6 inches diameter that materially impede flow or navigation of stream is punishable by $200 fine unless logs are moved in customary commercial manner).

[124] 451 So. 2d 201 (Miss. 1984).

[125] *Armstrong*, 451 So. 2d at 205 (citing MISS. CODE ANN. § 97-15-41 (1972)).

[126] *Id.* at 204.

[127] *Id.* at 205-06.

[128] *Id.* at 204, 207. The supreme court interpreted the injunction to require Georgia Pacific to remove only obstructions that were cut with a saw or used to build bridges and the silt accumulated from those obstructions. *Id.* The injunction did not require Georgia Pacific to remedy any damage done to the canal by natural causes. *Id.*

[129] MISS. CODE ANN. § 65-7-9 (1972).

[130] *Id.*

notice of assessment.[131] The timber owner's receipt of the value of damaged or dead trees should be counted as a blessing when contrasted with the potential for liability to third parties injured by dead or diseased trees or limbs falling onto the highway.[132]

Despite statutory provisions, the owner or possessor of land has not traditionally had an affirmative duty to remedy natural conditions upon the land, even though the conditions may be dangerous.[133] This general rule applies to the owner of rural lands, who is under no duty to make certain that every tree is safe and will not fall into a public highway.[134] However, if the owner knows the tree is dangerous, if the tree is in an urban area, or if the tree is planted in a row of trees next to the highway and therefore not a natural condition, the landowner may have a duty to exercise reasonable care, including a duty to inspect and to make sure the tree is safe.[135]

F. Environmental Issues

1. Prescribed Burning

Prescribed burning is "the deliberate use of fire under specified and controlled conditions, to accomplish one or more of several objectives of forest land management"[136] and is generally recognized as one of the most effective and inexpensive manage-

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[131] *Id.*

[132] *See generally* Annotation, *Liability of Private Owner or Occupant of Land Abutting Highway for Injuries or Damage Resulting from Tree or Limb Falling onto Highway*, 94 A.L.R.3d 1160, 1161-81 (1979) (private owner or occupant of land abutting a highway may be held liable on negligence or nuisance principles for injuries or damage resulting from tree or limb falling onto highway).

Liability of the landowner for damage due to fallen trees is based on a number of factors, including the amount of traffic on the road, the urban or rural location of the property, the amount of property held by the landowner, and the type of activity the landowner conducts on the land. *Id.*

[133] W.L. Prosser & W.P. Keeton, The Law of Torts § 57 (5th ed. 1984); *see* Restatement (Second) of Torts §§ 363(1)-(3), 364 (1965) (setting forth traditional rule holding that landowner has no duty to remedy natural conditions on property); McCleary, *The Possessor's Responsibility as to Trees*, 29 Mo. L. Rev. 159, 159 (1964).

[134] W.L. Prosser & W.P. Keeton, *supra* note 133.

[135] *Id.*

[136] Miss. Forestry Comm'n, Pub. No. 52, The Role of Prescribed Burning in Managing Your Southern Pine Forest.

ment tools available to timberland owners.[137] In Mississippi, both the Bureau of Pollution Control Department of Natural Resources and the Mississippi Forestry Commission have authority over various aspects of prescribed burning and should be consulted before any such activity is undertaken.

The Bureau of Pollution Control requires that three conditions be met before prescribed burning is allowed. First, permission must be obtained from the Mississippi Forestry Commission.[138] The Commission requires anyone undertaking prescribed burning first to contact the Commission's dispatching tower or the County Forester's office,[139] and if the weather is amenable to safe burning, personnel at the dispatching tower will issue a burning permit number over the telephone.[140] The second requirement of the Bureau of Pollution Control is that the burning must take place between one hour after sunrise and one hour before sunset unless the Mississippi Forestry Commission permits otherwise.[141] Third, if any starter or auxiliary fuels are used, they may consist only of dry vegetation and/or petroleum type fuels; no other combustible materials are permitted.[142]

2. Liability for Damage Resulting from Aerial Application of Pesticides, Herbicides, Seeds and Chemicals

The crop dusting industry blossomed dramatically in the period following World War II, largely as a result of an increased number of trained pilots and the availability of surplus aircraft, together with the development of new and effective pest control chemicals.[143] This sudden growth of the crop dusting industry gave rise to new issues of liability.[144] In Mississippi, the crop duster is assumed to be an independent contractor, and the per-

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[137] Mobley, *Prescribed Burning Reduces Fire Hazard, Promotes Regeneration and Wildlife Habitat*, FOREST FARMER 7 (Feb. 1982).

[138] Bureau of Pollution Control, Air Emission Regulation APC-S-1 § 3.7 (amended Dec., 1988).

[139] MISS. FORESTRY COMM'N, *supra* note 136.

[140] MISS. FORESTRY COMM'N, POLICY-PROCEDURES 14 (1987).

[141] *Id.*

[142] *Id.*

[143] Annotation, *Liability for Injury Caused by Spraying or Dusting of Crops*, 37 A.L.R.3d 833, 837 (1971).

[144] *Id.*

son responsible for hiring the crop duster is vicariously liable for damages resulting from the crop duster's negligence.[145] To this extent, crop dusting is considered to be an inherently dangerous activity.[146] Any person operating or employing airplanes for the purpose of spraying or dusting crops or other vegetation is held to a standard of due care in performing such operations.[147]

Crop dusting activities are regulated by statute in Mississippi. Since the term "crop" is not statutorily defined, it could be applied to the timber industry. If hormone-type herbicides are dispersed by aerial application, any person engaged in the application of these herbicides must obtain a license from the state entomologist[148] and furnish a bond or other security of at least $10,000.[149] Liability for damages resulting from the use of these herbicides is based on a negligence standard,[150] and a statutory penalty of up to $500 for each offense is provided by statute.[151]

The aerial application of pesticides, poisons, seeds and chemicals is regulated by the Agricultural Aviation Licensing Law of 1966,[152] which applies to agricultural aircraft operations, including "forest preservation."[153] The statute provides for the

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[145] Lawler v. Skelton, 241 Miss. 274, 288, 130 So. 2d 565, 569 (1961). The court held that farmers and horticulturists had a right to spray growing crops but could not avoid liability by using an independent contractor to conduct such activities. *Id.*

[146] *Id.*

[147] *Id.* at 289, 130 So. 2d at 569, (citing 6 AM. JUR. *Aviation* § 44 (1950)).

[148] MISS. CODE ANN. § 69-21-7 (1972).

[149] *Id.* § 69-21-13.

[150] *Id.* § 69-21-15.

[151] *Id.* § 69-21-27.

[152] *Id.* §§ 69-21-101 to -125 (Supp. 1989).

[153] *Id.* § 69-21-105(a)(3). "Aircraft" is defined as "any contrivance now known or hereinafter invented that is used or designed for navigation of or flight in air over land and water, and that is designed for or adaptable for use in applying pesticides, defoliants, seeds and fertilizers." *Id.* § 69-21-105(e). Helicopters, as well as planes, would be included in this definition; both are frequently used by industrial forestry companies for setting control burns, application of seeds, herbicides, hardwood control, pine release, fertilization, inspection for pine beetle infestations, fire control and detection, aerial photography, and other forestry activities. *See* Mississippi Forestry Commission, *Muddy Boots and Propwash*, 3 FORESTRY FORUM No. 2, at 34 (Winter 1989-90). *See generally*, SOCIETY OF AMERICAN FORESTERS, FORESTRY HANDBOOK §§ 6.35-39, 7.13, 8.3, 19.1-27 (1955).

creation of a state Board of Agricultural Aviation.[154] The Board is empowered, among other things, to regulate the application of chemicals and pesticides, to restrict the use of certain chemicals and pesticides which are hazardous to the health, safety and welfare of the public, and to license pilots.[155] The Act imposes a negligence standard and requires any person damaged as a result of crop dusting activities to file a written statement with the Mississippi Department of Agriculture and Commerce within sixty days of the date the damage occurred.[156] Statutory penalties for violations of the Act include fines of $100 to $500 and/or imprisonment for up to six months.[157]

3. Solid Waste

Solid waste disposal questions frequently encountered in the timber industry include disposal of solid waste generated from production facilities, as well as the unauthorized dumping on industry-owned land by trespassers. In 1974, Mississippi took its first step in addressing the environmental issues involved in the disposal of "solid waste" by enacting the Solid Wastes Disposal Law of 1974.[158] Subsequently, the Mississippi Board of Health adopted regulations that prohibited the construction or operation of facilities for collecting, transporting, processing, or disposing of solid waste without a permit.[159] An industrial tim-

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[154] MISS. CODE ANN. § 69-21-107 (Supp. 1989).

[155] *Id.* §§ 69-21-109, -113.

[156] *Id.* § 69-21-123.

[157] *Id.* § 69-21-125.

[158] Act of April 24, 1974, ch. 573, 1974 Miss. Laws 854-58 (codified at MISS. CODE ANN. §§ 17-17-1 to -135 (Supp. 1989)); *see* EPA Solid Waste Disposal Facility Guidelines, 40 C.F.R. § 257 (1989) (setting forth criteria for classification of solid waste disposal facilities). Solid waste is defined as meaning any garbage, refuse, or sludge from waste water or air pollution treatment plants or control facilities and also includes other discarded materials resulting from industrial, commercial, mining, and agricultural operations, and community activities. Solid waste does not include material and domestic sewage, pollution governed by the Federal Water Pollution Control Act or nuclear or by-product material as defined by the Atomic Energy Act. MISS. CODE ANN. § 17-17-3(a) (Supp. 1989).

[159] 1974 Miss. Laws, 573, § 6 empowered the State Board of Health to adopt rules and regulations needed to specify procedures to meet the requirements of the Solid Waste Disposal Act of 1974. On September 14, 1978, the Mississippi State Board of Health, for the first time, adopted "Regulations Governing Solid Waste Management." Section D, paragraph 401.34 of those regulations contains the prohibition concerning col-

ber company generating solid waste must dispose of that waste according to the requirements of state law and regulations. Garbage and putrescible wastes must be placed in sanitary landfills where the solid waste is compacted and covered with earth each day.[160] Rubbish not containing putrescible wastes must be placed in approved landfills where cover need not be applied on a daily basis.[161] Solid waste generated in silvicultural activities is excluded from coverage under Mississippi law and may be left on-site since it is not required to be placed in an approved sanitary landfill or other facility.[162]

An industrial timber company that generates solid waste from production facilities can dispose of its waste in approved off-site facilities or on its own land. Mississippi statutes specifically allow a firm to dispose of its own solid waste on its land, provided the waste is not hazardous.[163] Any business disposing of solid waste on its lands is subject to solid waste disposal site investigations or inventories required by federal and state law; the business would also be subject to regulation under state law if the solid waste is determined to have characteristics that con-

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lecting, transporting, processing or disposing of solid waste without a permit. Procedures for obtaining permits and regulations concerning permitted facilities have changed since the adoption of the initial regulations in 1978. Administration and enforcement of the Solid Waste Disposal Law of 1974 were transferred from the State Board of Health to the Bureau of Pollution Control of the Mississippi Department of Natural Resources and the Mississippi Commission on Natural Resources by 1981 Miss. Laws, 528 (codified at Miss. Code Ann. § 17-17-2 (Supp. 1989). After this transfer was accomplished, subsequent solid waste regulations were adopted, including Mississippi Department of Natural Resources, Bureau of Pollution Control, Non-Hazardous Waste Management Regulation, No. PC/S-1 (Sept. 1984); Mississippi Department of Natural Resources, Bureau of Pollution Control, Non-Hazardous Waste Management Regulations, No. PC/S-1 (Sept. 1985), Mississippi Department of Natural Resources, Bureau of Pollution Control, Non-Hazardous Waste Management Regulations, No. PC/S-1 (June 1987), and Mississippi Department of Natural Resources, Bureau of Pollution Control, Non-Hazardous Waste Management Regulation, No. PC/S-1 (July 6, 1988).

[160] Miss. Code Ann. § 17-17-3(g) (Supp. 1989); *see* Mississippi Department of Natural Resources, Bureau of Pollution Control, Non-Hazardous Waste Management Regulation, No. PC/S-1, § D (July 6, 1988) (solid waste sanitary landfill regulation).

[161] Miss. Code Ann. § 17-17-3(h) (Supp. 1989); *see* Mississippi Department of Natural Resources, Bureau of Pollution Control, Non-Hazardous Waste Management Regulation, No. PC/S-1, § E (July 6, 1988) (rubbish disposal facility regulations).

[162] § A, ¶ 2e (July 6, 1988) (examples of silvicultural activities specifically cited in regulations are "timber harvesting slash and land clearing debris").

[163] Miss. Code Ann. § 17-17-13 (Supp. 1989).

stitute a danger to the environment or the public health, safety or welfare.[164]

Industrial timber companies owning large tracts of land in rural areas that do not have county or municipal garbage collection services or conveniently located public use sanitary landfills can face severe problems in controlling illegal or unauthorized dumping. Mississippi recognizes unauthorized dumping as a "public nuisance *per se*" and requires it to be eliminated by removal or on-site burial.[165]

Violations of the provisions of Mississippi's Solid Wastes Disposal Law, or any rules, regulations or written orders promulgated pursuant to that law subject the wrongdoer to civil penalties of up to $25,000 per violation, mandatory or prohibitory injunctive orders, damage equal to the cost incurred in restoring loss of wildlife, and costs of remedial or cleanup actions.[166] In addition, a violator could be convicted of a misdemeanor and face criminal penalties of imprisonment for one year or less for each separate offense.[167]

4. Hazardous Substances and Hazardous Waste

Society's concern over hazardous substances and hazardous waste is shared by the forest products industry. Industries' transforming of raw materials into finished products frequently results in the generation of hazardous substances and hazardous waste. As owners of property, industrial timber companies also face potential liability for cleaning up hazardous materials on their property.

The Environmental Protection Agency (EPA) has various sources of regulatory power in dealing with hazardous chemicals. If the chemical is manufactured for nonpesticidal uses, it can be regulated under the Toxic Substances Control Act (TSCA).[168] EPA can also regulate chemicals under the Federal Insecticide,

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[164] *Id.* § 17-17-29.
[165] *Id.* § 17-17-17.
[166] *Id.* § 17-17-29(1).
[167] *Id.* § 17-17-29(5).
[168] 15 U.S.C. §§ 2601-27 (1982 & Supp. 1989).

Fungicide and Rodenticide Act (FIFRA).[169]

The release of hazardous substances into the environment is governed by two general categories of federal environmental laws, those concerning generation, transportation, storage and disposal of hazardous waste, and those dealing with hazardous waste emergencies and cleanup.[170] Laws in the first category are contained in the Solid Waste Disposal Act, more commonly known as the Resources Conservation and Recovery Act (RCRA).[171] Administered by the EPA,[172] RCRA is designed to provide a recording system for the movement of hazardous waste, to ensure disposal of hazardous waste is accomplished without environmental contamination, and to provide an enforcement mechanism to ensure compliance.[173] Hazardous waste emergencies and cleanup are dealt with in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Authorization Act of 1986.[174] CERCLA authorizes the federal government to require or take remedial action upon the release of a hazardous substance into the environment.[175] CERCLA also establishes a fund to be used by the government in implementing a cleanup and provides that owners and operators of facilities where hazardous substances have been released are potentially liable for the cleanup of such substances.[176]

The United States may hold a person or entity liable for a cleanup if it is shown that the site is a "facility,"[177] a "release"[178]

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[169] 7 U.S.C. § 136(a)-(y) (1982 & Supp. 1989).

[170] D.W. Steven, Law of Chemical Regulation and Hazardous Waste 5-6 (1989). State laws have also been enacted to deal with hazardous substances and hazardous waste. *See, e.g.*, Miss. Code Ann. § 17-17-15 (1972 & Supp. 1989) (regulating disposal of hazardous waste); *id.* § 49-29-1 to -11 (1972 & Supp. 1989) (same).

[171] 42 U.S.C. § 1-6987 (1982) (current version at 42 U.S.C. §§ 6901-6991 (Supp. 1989)).

[172] Solid Wastes, 40 C.F.R. § 240-81 (1989).

[173] D.W. Steven, *supra* note 170, at 5-7.

[174] 42 U.S.C. §§ 9601-9657 (1982) (current version at 42 U.S.C. §§ 9601-9675 (Supp. 1987)).

[175] *Id.* § 9604.

[176] *Id.* § 9607(a).

[177] The term "facility" is defined in 42 U.S.C. § 9601(9).

[178] The term "release" is defined in 42 U.S.C. § 9601(22).

of a "hazardous substance"[179] from the site has occurred or is occurring, the release has caused the United States to incur response costs,[180] and the defendant is a "person" as defined by CERCLA.[181] There are very few defenses to liability under CERCLA. A person otherwise liable can escape liability only by showing that the release of hazardous substances and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party not in a contractual relationship with the defendant where the defendant exercised due care with respect to the hazardous substance and took precautions against foreseeable acts or omissions of the third party; or (4) any combination of the above.[182]

In addition to liability for the cost of a cleanup, any party who willfully violates or refuses to comply with a cleanup order may be further subject to civil fines[183] and punitive damages.[184] Additionally, civil penalties may be assessed for violation of the provisions relating to notice, destruction of records, financial responsibility, settlement agreements, and violations of administrative orders, consent decrees or agreements.[185]

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[178] The term "hazardous substance" is defined as:

(A) [a]ny substance designated pursuant to § 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution or substance designated pursuant to § 9602 of this Title, [authorizing the Administrator to designate additional substances as hazardous], (C) any hazardous waste having the characteristics identified under or listed pursuant to § 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] . . . (D) any toxic pollutant listed under § 1317(a) of Title 33, (E) any hazardous air pollutant listed under § 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to § 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof, which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14) (Supp. 1989).

[180] 42 U.S.C. § 9601(14) (Supp. 1989).

[181] United States v. Northernaire Plating Co., 670 F. Supp. 742, 746 (W.D. Mich. 1987); United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987).

[182] 42 U.S.C. § 9607(b) (1982).

[183] *Id.* § 9607(c)(1) (Supp. 1987).

[184] *Id.* § 9607(c)(3) (Supp. 1987).

[185] *Id.* § 9609 (Supp. 1987).

5. Air and Water Pollution

The regulation and control of air and water pollution is primarily the responsibility of the individual states.[186] With the enactment of the Clean Air Act Amendments of 1970,[187] however, the federal government took on a significant role in regulating air quality.[188] Under the Act, the EPA established national ambient air quality standards, standards for pollutant emissions from new and modified stationary sources, hazardous air pollutants standards, and standards for motor vehicle emission.[189]

On the state level, Mississippi has enacted the Mississippi Air and Water Pollution Control Law[190] and empowered the Mississippi Commission on Natural Resources to administer and enforce its provisions.[191] The Commission is also empowered to set ambient standards for both air and water quality in the state.[192] Violation of any provision of the Pollution Control Law can result in a civil penalty of up to $25,000 per violation, with each day on which a violation occurs being deemed a separate and additional violation.[193] In addition to civil penalties, the Commission is empowered to obtain mandatory or prohibitory injunctive relief and may recover the costs of restocking waters, replenishing wildlife, and/or instituting remedial or cleanup action made necessary by the violation of pollution control laws.[194]

6. Wild and Scenic Rivers

In 1986, the United States Congress enacted the Wild and Scenic Rivers Act.[195] Finding that certain rivers and their imme-

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[186] *See supra* notes 68-89 and accompanying text (federal water pollution regulations and best management practices).

[187] 42 U.S.C. § 1857 (1982) (current version at 42 U.S.C. § 7401 (Supp. 1987)).

[188] F.F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 3.03 (1981).

[189] *Id.* §§ 3.03 -.09.

[190] MISS. CODE ANN. §§ 49-17-1 to -43 (1972 & Supp. 1989).

[191] *Id.* §§ 49-17-1, -43.

[192] *Id.* § 49-17-19.

[193] *Id.* § 49-17-43(a).

[194] *Id.* § 49-17-43(b)-(d).

[195] 16 U.S.C. §§ 1271-1287 (1982) (amended 1988). The idea of giving special consideration to the preservation of streams existing in a natural state may have originated in a Natural Park Service response to inquiries from the Senate Select Committee on Natural

diate environments possessed outstanding scenic, recreational, geologic, wildlife, historic, and cultural value, Congress declared that the policy of the United States was to preserve those rivers in a free-flowing condition and to protect them for the benefit of present and future generations.[196]

The National Wild and Scenic River System comprises rivers that have been included by act of Congress[197] or rivers designated by an act of a state legislature to be administered as wild, scenic or recreational rivers if their inclusion in the river system has been approved by the Secretary of Interior.[198] In order for a river to be eligible for inclusion in the system, it must be a free-flowing stream and possess one or more of the values incorporated in the declaration of Congress.[199]

When any federal lands are included within the National Wild and Scenic River Systems, the federal department or agency with jurisdiction over those lands must follow such management policies as are necessary to protect the rivers.[200] Such agencies are specifically directed to pay particular attention to scheduled timber harvesting, road construction and other activities that might be contrary to the purposes of the Act.[201] In Mississippi, the segment of Black Creek from Fairley Bridge landing upstream to Moody's Landing is included in the Wild and Scenic River System.[202] Because this section of Black Creek also lies partially in DeSoto National Forest, timber harvesting along Black Creek on federal lands may be restricted or prohibited.[203]

Resources. 1968 U.S. CODE CONG. & ADMIN. NEWS 3801, 3802.

[196] 16 U.S.C. § 1271 (1982) (amended 1988).

[197] *Id.* § 1274 (Supp. 1989).

[198] *Id.* § 1273 (1982); *see* Fairfax, Andrews & Buchsbaum, *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417, 425-30 (1984) (noting that this provision holds possibility of creating administrative conflict between state and federal governments as well as competing federal agencies).

[199] 16 U.S.C. § 1273 (1988).

[200] *Id.*

[201] *Id.* § 1283.

[202] *Id.* § 1274(a)(59) (Supp. 1989).

[203] The restrictions upon timber harvesting on federal lands along wild and scenic rivers that may be imposed pursuant to 16 U.S.C. § 1283 are in addition to the general restrictions on timber harvesting in national forests. The forestry service generally prohibits cutting timber unless authorized by timber sale contract, federal law or regulation. 36 C.F.R. § 261.6 (1989). Management plans concerning the disposal of timber must be

7. Endangered Species

Over fifty years ago, Aldo Leopold considered the reasons why species became rare and extinct. He concluded that the cause was "shrinkage in the particular environments which their particular adaptations enable them to inhabit."[204] In advocating a "conservation ethic," he suggested that shrinkage be controlled by modifying the environment with agricultural and forestry tools.[205] Today, the Society of American Foresters continues to review the philosophy of Leopold in determining whether it should include a statement about land ethics in its code of ethics.[206]

The United States Congress resolved any question concerning the policy of this country to protect endangered species of fish, wildlife and plants with the adoption of the Endangered Species Act in 1973.[207] That Act was adopted as a means of preserving the ecosystems upon which endangered[208] or threatened[209] species depend.[210] The Act empowers the Secretary of the Interior to promulgate regulations that determine whether species are endangered or threatened and to designate critical habitats for such species.[211] A list of endangered and threatened wildlife, which is published in the Federal Register,

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prepared for each national forest. 36 C.F.R. § 221.3 (1989). Persons conveying lands to the forest service who reserve timber rights must cut and remove their timber according to specific rules and regulations. 36 C.F.R. § 251.14 (1989). Other federal statutes regulating forestry practices on forests, ranges and lands include the Forest and Rangeland Renewable Resources Planning Act of 1974. 16 U.S.C. §§ 1600-1687 (1988) and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (1988).

[204] Leopold, *Conservation Ethic*, 87 J. FORESTRY 26, 44 (June 1989).

[205] *Id.*

[206] Coufal, *The Land Ethic Question*, 87 J. FORESTRY 22 (June 1989).

[207] 16 U.S.C. §§ 1531-1544 (1988). This Act was not the first federal statute dealing with endangered species. Earlier legislation included the Endangered Species Preservation Act of Oct. 15, 1966, Pub. Law No. 89-669, 80 Stat. 926 and the Endangered Species Conservation Act of 1969, Pub. Law No. 91-135, 83 Stat. 275. 1973 U.S. CODE CONG. & ADMIN. NEWS 2990.

[208] Endangered species are defined as species in danger of extinction throughout all or a significant portion of their range. 16 U.S.C. § 1532(6) (1988).

[209] Threatened species are defined as any species likely to become an endangered species in the foreseeable future throughout all or a significant portion of their range. 16 U.S.C. § 1532(20) (1988).

[210] *Id.* § 1531(b).

[211] *Id.* § 1533. Those regulations are codified at 50 C.F.R. § 424.01-424.21 (1989).

provides information regarding the species' common name, scientific name, historical range, population, status as endangered or threatened, critical habitat, and special rules.[212] The Act also requires federal agencies to ensure that their actions do not jeopardize the existence of endangered or threatened species.[213] This provision has been the basis of attempts by various conservation or wildlife groups to stop certain types of federal activities. In Mississippi, this provision served as the basis for a suit challenging the construction of Interstate Highway 10 because of the impact upon the sandhill crane.[214] Although the effect of the highway construction was the subject of the suit, the case also addressed the destructive impact of past timber management practices on the habitat of the crane.

Recent attention has been focused in other regions of the country upon the plight of the northern spotted owl and other endangered or threatened species located on United States Forest Service lands where timber harvesting might occur within the critical habitat of the species.[215] Southern states, including Mississippi, will soon see similar issues raised as the United States Forest Service authorizes harvesting of its timber in the South.[216]

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[212] 50 C.F.R. § 17.11 (1989).

[213] 16 U.S.C. § 1536 (1976).

[214] National Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976). The trial testimony of expert witnesses indicated that in recent years paper companies had acted in consultation with the Fish and Wildlife Service to safeguard the habitat of the crane. *Id.* at 374 n.20.

[215] *Rage Over Trees* (Turner Broadcasting Sept. 1989). A portion of the program was devoted to the northern spotted owl, with arguments made by environmentalists that the harvesting of timber from ancient forests in the Willamette National Forest near Opal Creek, Oregon, would adversely impact the northern spotted owl and the ecosystem as a whole. *Id.*

[216] *Land Swap Questions: Can Hunters, Soldiers Co-Exist?* The Clarion Ledger, Jan. 7, 1990, at 1A, Col. 1. Walter Sellers, manager of the Leaf River Wildlife Management Area, had tried to persuade the U.S. Forest Service not to clearcut old-growth forests along Whiskey Creek in South Mississippi. *Id.* Sellers was also concerned with a potential land swap involving 16,000 acres of Colorado grass land owned by the Department of the Army and 32,000 acres of the DeSoto National Forest, including a majority of the Leaf River Preserve that is owned by the United States Forest Service. *Id.* The land acquired by the Department of the Army would be used for tank maneuvers by Mississippi National Guardsmen. *Id.* Sellers questioned the impact of such a trade upon the wildlife, including endangered and threatened species such as the black bear, red-

Any person who knowingly violates the Endangered Species Act may be assessed civil fines of up to $25,000 for each violation.[217] The Act also provides for the imposition of criminal penalties of up to one year in prison and/or a $50,000 fine.[218] Persons reporting violators may receive rewards for their efforts in aiding enforcement of the Act.[219]

In 1974, Mississippi enacted the Nongame and Endangered Species Conservation Act,[220] which was predicated upon a legislative determination that endangered species of wildlife indigenous to the state should be protected.[221] Pursuant to the statute, the State Game and Fish Commission compiles a list of endangered species that is reviewed every two years.[222] There are presently forty-five species and sub-species of animals on the Mississippi list.[223] That list is divided into groups of mussels, fish, amphibians, reptiles, birds, and mammals, and it identifies the species by common and scientific name as well as indicating whether those species are subject to federal protection.[224] Any

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cockaded woodpecker, gopher tortoise and black pine and indigo snakes. *Id.*

The red-cockaded woodpecker will likely be to southern pine what the northern spotted oil has become for douglas fir: a symbol and rallying cry for the preservation of old growth. It is generally acknowledged that the red-cockaded woodpecker has become an endangered species because its habitat is mature pine forest with an open understory. That habitat is uncommon today due to forestry practices emphasizing the harvesting of pine before the tree reaches the maturity preferred by the red-cockaded woodpecker. Recommendations from the Mississippi Department of Wildlife Conservation for survival of this species include calls for publicly owned forestland to "be managed to produce old-growth timber." *See* "Red-Cockaded Woodpecker" in MISS. DEPT. OF WILDLIFE, FISHERIES & PARKS, MUSEUM OF NATURAL SCIENCE, PORTFOLIO: ENDANGERED SPECIES OF MISSISSIPPI (1988) [hereinafter ENDANGERED SPECIES]

[217] 16 U.S.C. § 1540(a) (1988).

[218] *Id.* § 1540(b).

[219] *Id.* § 1540(d).

[220] MISS. CODE ANN. § 49-5-101 to -119 (Supp. 1989).

[221] *Id.* § 49-5-103(b).

[222] *Id.* § 49-5-109.

[223] ENDANGERED SPECIES, *supra* note 216.

[224] *Id.* Most Mississippians would expect to see the Mississippi sandhill crane, bald eagle, red-cockaded woodpecker and black bear on the list but could be surprised with the listing of less well known species such as the southern pink pigtoe (mussel), freckle-bellied madtom (fish), yellow-blotched sawback (reptile), or West Indian manatee (mammal). An informative packet of information entitled "Endangered Species of Mississippi" is available upon request from the Mississippi Department of Wildlife, Fisheries, and Parks, Museum of Natural Science, 111 North Jefferson Street, Jackson, Mississippi 39201-2897. *See* ENDANGERED SPECIES, *supra* note 216.

person violating the Nongame and Endangered Species Conservation Act may be subject to penalties of up to $1,000 and imprisonment of up to one year.[225] Additionally, the Act empowers law enforcement officers to seize equipment and merchandise used in connection with any violation of the Act and provides that such equipment and merchandise may be forfeited to the state upon conviction of the violator.[226]

G. Impact of the Occupational Safety and Health Act

The Occupational Safety and Health Act of 1970 (OSHA)[227] was enacted by Congress to improve safety in the work place. Three new government agencies were created to aid in developing and enforcing the directives of OSHA. The National Institute for Occupational Safety and Health (NIOSH) is contained within the Department of Health and Human Services and conducts scientific research necessitated by OSHA.[228] The Occupational Safety and Health Administration within the Department of Labor is responsible for enforcement and promulgation of OSHA regulations.[229] Finally, the Occupational Safety and Health Review Committee is charged with adjudicating administrative cases arising under OSHA.[230]

Several sections of OSHA are applicable to the timber industry. Standards promulgated for agriculture establish general safety requirements for tractors and other machines with moving parts and also prescribe field sanitation standards for drinking water and restroom facilities.[231] Other OSHA regulations pertain directly to pulpwood logging. These regulations apply to the preparation and moving of pulpwood timber from the stump to the point of delivery, but do not apply to logging operations relating to sawlogs, vernier bolts, poles, piling, and other forest products.[232] The regulations prescribe standards for protective

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[225] § 49-5-101(b).
[226] § 49-5-115.
[227] 29 U.S.C. §§ 651-678 (1982).
[228] 29 C.F.R. § 1928 (1989).
[229] *Id.* § 1910.266.
[230] ROTHSTEIN, EMPLOYMENT LAW 512-13 (1987).
[231] 29 C.F.R. § 1928 (1989).
[232] *Id.*

gear and apparel, environmental conditions, work areas, operation of chain saws, stationary and mobile equipment operations, road conditions and explosives.[233] The regulations also prescribe minimum road standards and regulate the harvesting and transportation of trees.

OSHA covers every "employer" in a business affecting commerce who has one or more employees.[234] Status as an "employer" or "employee" under OSHA has been a frequently litigated issue. Rather than utilizing narrow common-law definitions, courts have looked to the purpose of OSHA in deciding this issue.[235] Because OSHA has the broad remedial purpose of protecting the worker from industrial injury, "employer" and "employee" have been defined more expansively under OSHA than for wage or tort purposes.[236]

Violations of OSHA can result in the imposition of both civil and criminal penalties. Civil penalties of up to $1,000 per violation are assessable for both "serious"[237] and "non-serious"[238] violations, while willful or repeated violations may result in penalties of up to $10,000 for each such violation.[239] Criminal penalties may be imposed against an employer for willful violations which result in the death of an employee,[240] against any

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[233] *Id.*

[234] 29 U.S.C. § 652(5) (1982); OCCUPATIONAL SAFETY AND HEALTH ADMINSTRATION, UNITED STATES DEPARTMENT OF LABOR, ALL ABOUT OSHA 3 (1982). Whether or not the worker is an employee or independent contractor is frequently at issue in OSHA proceedings. *See Van Buren—Madawaska Corp.*, Employment Safety and Health Guide (CCH) 1989 OSHA, para. 28,504 at 37,779 (May 9, 1989) (noting reversal of summary judgment in favor of timber developer where several elements of "economic realities" test used to determine status as employer or independent contractor were in factual dispute).

[235] *See* Clarkson Constr. Co. v. Occupational Safety & Health Review Comm'n, 531 F.2d 451 (10th Cir. 1976); Frohlick Crane Serv., Inc. v. Occupational Safety & Health Review Comm'n, 521 F.2d 628 (10th Cir. 1975).

[236] *Clarkson*, 531 F.2d at 458.

[237] A "serious" violation is one in which there is a substantial probability that death or serious physical harm could result and the employer knew or should have known of such probability. 29 U.S.C. § 666(k) (1982).

[238] A "non-serious" violation is one which directly relates to job safety and health, but which probably would not cause death or serious physical injury. 29 U.S.C. § 666(k) (1982).

[239] *Id.* § 666(a)-(c).

[240] *Id.* § 666(e).

person who gives advance notice of an inspection by OSHA personnel,[241] and against any person who knowingly makes any false statement, representation or certification in any document filed or required to be maintained by OSHA regulations.[242]

H. Land Use Regulations

The timber industry's dependence on fee ownership or leasehold interests in land renders any zoning restrictions and land use regulations potentially devastating to a timber company's viability. A land use regulation which a governmental body has concluded will promote the health, safety, morals or general welfare will generally be upheld despite the adverse effects on recognized property interests.[243] In determining whether the government must compensate an injured landowner, the courts will consider the regulation's economic impact on the landowner and the extent to which it has interfered with "distinct investment-backed expectations."[244] A governmental land use regulation can amount to a "taking" where the ordinance "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[245]

One example of land use regulations in Mississippi is the restriction placed on the use of lands adjoining airports. Mississippi statutes provide that every political subdivision having an airport hazard[246] within its limits may adopt and enforce regulations specifying permitted land uses and restricting the height to which trees may grow.[247] Permits or variances must be obtained for trees to grow higher or become a greater hazard to air navigation than when the regulations were adopted.[248]

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[241] *Id.* § 666(f).

[242] *Id.* § 666(g).

[243] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978). The Supreme Court has upheld the constitutionality of zoning ordinances for over 60 years. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[244] *Penn Central*, 438 U.S. at 124.

[245] United States v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

[246] An airport hazard includes any tree that obstructs airspace or is otherwise hazardous to the landing or taking off of aircraft. MISS. CODE ANN. § 61-7-3(2) (1972).

[247] *Id.* § 61-7-7(1).

[248] *Id.* § 61-7-17.

Zoning restrictions are not generally classified as a "taking" and therefore do not require compensation to an injured party.[249] Determining whether a particular zoning regulation is valid requires balancing the public interest against the rights of individual owners.[250] Zoning regulations carry a presumption of reasonableness in favor of their validity.[251]

The rezoning of an area from one classification to another could significantly affect a business located therein. For that reason, reclassification of property from one category to another requires proof that there was a mistake in the original zoning or that the character of the affected area has changed to such an extent that rezoning is justified in the public interest.[252]

As a general rule, a use existing at the time a zoning ordinance goes into effect cannot be restricted by that ordinance unless the use was illegal, a nuisance or harmful to the public.[253] Typically, nonconforming uses are "grandfathered" into a new or revised ordinance.[254] However, nonconforming uses are frequently subject to some regulation. For example, although one may preserve a nonconforming use by repair and restoration, prohibitions often exist against substantial changes in structures or the area associated with the use. Additionally, abandonment of the nonconforming use terminates the owner's right to utilize his property in a manner that does not conform with present zoning regulations.[255]

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[249] *See* City of Jackson v. Bridges, 139 So. 2d 660, 663 (Miss. 1972) (constitutionality of zoning as valid exercise of police power).

[250] *Id.* Mississippi zoning regulations and zoning changes are governed by MISS. CODE ANN. §§17-1-15, -17, respectively.

[251] City of Clinton v. Conerly, 509 So. 2d 877, 883 (Miss. 1987) (citing Holcomb v. City of Clarksdale, 217 Miss. 892, 65 So. 2d 281 (1953)). *See generally* Gladden, *The Change or Mistake Rule: A Question of Flexibility*, 50 MISS. L.J. 375 (1979) (presumption of validity).

[252] *Conerly*, 509 So. 2d at 883.

[253] 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS 11 (3d ed. 1986).

[254] *Id.* at 7; *see, e.g.*, MISS. CODE ANN. § 61-7-15 (Supp. 1989) (airport zoning regulations may not require removal or alteration of nonconforming trees that existed when regulations were adopted or amended).

[255] 8A E. MCQUILLIN, *supra* note 253, at 18-19. *See generally*, Annotation, *Change in Area or Location of Nonconforming Use as Violation of Zoning Ordinance*, 56 A.L.R.4th 769 (1987); Annotation, *Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Difficulties Unrelated to Governmental Activity*, 56 A.L.R.3d 14 (1974).

I. Tax Issues

1. Federal Taxes

For federal income tax purposes, "timber" includes both standing trees suitable for the production of lumber, pulpwood, or other wood products[256] and evergreen trees more than six years old if severed from their roots and sold for ornamental purposes.[257] Also, under federal regulations, a taxpayer must "own" an economic interest in standing timber for income tax purposes.[258] The most common forms of economic interest in standing timber are royalty interests,[259] contractual cutting contract rights[260] and ownership. Only those taxpayers meeting the statutory definition of ownership[261] may elect to consider an intracompany transaction as a sale or exchange of timber,[262] or retain an economic interest in a transaction for the disposal of timber.[263]

An owner of timber may elect to avoid income tax on 100% of the income derived from cutting and selling timber if the taxpayer owned the timber or a contract right to cut the timber for more than one year prior to date the timber is cut.[264] However, the timber must be cut for sale or use in the taxpayer's trade or business under this exception.[265] The taxpayer is treated as if he sold the cut timber to himself, and his gain or loss is determined

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[256] DEPARTMENT OF AGRIC., HANDBOOK NO. 596, A GUIDE TO FEDERAL INCOME TAX FOR TIMBER OWNERS 20 (1982).

[257] 26 U.S.C. § 631(a) (1986).

[258] *See* Treas. Reg. § 1.611-1(b)(1) (1983).

[259] A royalty interest in timber is the interest retained by the owner after granting a contract right to cut to another party and may exist for the life of the property or a term of years. *See* Pankratz v. Commissioner, 22 T.C. 1298 (1954); Rev. Rul. 80-73, 1980-1 C.B. 128; Rev. Rul. 77-400, 1977-2 C.B. 206; Rev. Rule. 69-352, 1969-1 C.B. 34.

[260] A contract right to cut must include the right to sell the cut timber or to use the cut timber in trade or business. Contracts which merely arrange for the performance of cutting services are regarded as service contracts and do not create a royalty interest in the timber. Rev. Rul. 58-295, 1958-1 C.B. 249.

[261] Owners include "Any person who owns an interest in such timber, including a sub-lessor and a holder of a contract to cut timber." 26 U.S.C. § 631(b); Rev. Rul 77-247, 1977-2 C.B. 211.

[262] 26 U.S.C. § 631(a) (1986).

[263] *Id.* § 631(b).

[264] *Id.* § 631(a).

[265] *Id.*

by the difference between the fair market value of the cut timber and its fair market value as standing timber.[266] Any resulting gain or loss is then aggregated with other gains or losses allowed under the Internal Revenue Code provisions.[267]

Section 631(b) determines the gain or loss resulting from an owner's disposition of timber when he retains an economic interest in the timber.[268] These provisions require that the disposal transaction be governed by a contract.[269] The gain or loss resulting from such a transaction is figured as the difference between the amount realized from the disposal and the adjusted basis for depletion.[270] Adjusted depletion basis is the basis to the taxpayer at acquisition plus capitalized expenses and less certain losses and allowable depletion.[271]

Although there are no specific provisions in the Code addressing the tax treatment of certain unique practices inherent in the timber industry, some tax regulations and revenue rulings have been promulgated that deal with other aspects of the industry. For example, planting and reforestation costs are capitalized and recovered through depletion allowances,[272] and cost incurred for building logging roads is also capitalized.[273] Also Christmas tree operations can deduct costs incurred for pruning and shearing that preserve and maintain the value of the trees.[274]

2. State Taxes

Mississippi assesses a privilege tax on persons engaged in

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[266] Treas. Reg. § 1.631-1(a)(1). The fair market value is determined by such factors as the character and the quality of timber, the quantity of timber per acre, accessibility of the timber, and freight rates. Treas. Reg. § 1.611-3(f).

[267] 26 U.S.C. § 1231(b)(2) (1986).

[268] *Id.* § 631(b) (1986).

[269] Treas. Reg. § 1.631.2(a)(1) (1980). This language has been literally interpreted to include binding oral contracts. Rev. Rul. 83-160, 1983-2 C.B. 99.

[270] Treas. Reg. § 1.631-2(a)(1) (1980).

[271] *See* 26 U.S.C. § 1016(a); Treas. Reg. § 1.611-1(c) (1973), 1.611-3(b) (1960).

[272] Treas. Reg. § 1.611-3(a) (1960); Rev. Rul. 75-467, 1975-2 C.B. 93; Rev. Rul. 76-290, 1976-2 C.B. 188.

[273] Tax treatment is different for primary, secondary, and spur roads. Rev. Rul. 68-193, 1968-1 C.B. 79.

[274] Rev. Rul. 71-228, 1971-1 C.B. 53.

the business of "growing, felling, cutting, severing and producing" logs or timber products.[275] The severed timber is assessed by its quantity and value,[276] with valuation computed at the date of severance.[277] Standing timber and severed timber remaining in the log state are exempt from all ad valorem taxes.[278] Pulpwood measured by volume under the Mississippi Uniform Pulpwood Scaling Practices Act is subject to a $.08 per cord fee that must be submitted to the State Tax Commission.[279]

County boards of supervisors and municipal authorities have a discretionary power to grant ten-year exemptions from non-state ad valorem taxation to certain new enterprises.[280] Timber-related enterprises which may be exempted under this provision include wood veneering plants, pulp plants, paper plants, and sawmills.[281]

J. Secured Transactions: Timber Interests as Realty and Personalty

Mississippi courts traditionally held that the sale of standing timber constituted a conveyance of an interest in real property.[282] In 1977, however, the sale of standing timber was statutorily reclassified as a contract for the sale of personalty.[283]

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[275] MISS. CODE ANN. § 27-25-1(1) (Supp. 1989).

[276] *Id.* § 27-25-1(a)-(h).

[277] *Id.* § 27-25-5.

[278] *Id.* § 27-25-27.

[278] *Id.* § 75-79-33 (Supp. 1989).

[280] *Id.* § 28-31-101 (Supp. 1989).

[281] *Id.* § 27-31-101 (Supp. 1989).

[282] *See* Butterfield Lumber Co. v. Guy, 92 Miss. 361, 373, 46 So. 78, 79 (1908) (rejecting personalty theory for timber sales); Harrell v. Miller, 35 Miss. 700, 702 (1858) (noting that term "land" includes produce grown upon it).

[283] MISS. CODE ANN. § 75-2-107(2) (Supp. 1989). The 1977 modification of this statute was related to the 1972 proposed amendment to the model Uniform Commercial Code. The official reason stated as a basis for the change in the model code was that "[s]everal timber growing states have changed the . . . Code to make timber to be cut under a contract of severance goods, regardless of the question of who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of 'goods' in section 9-105. To protect persons dealing with timberlands, filing on timber to be cut is required in part 4 of Article 9 to be made in real estate records in a manner comparable to fixture filing." 1 U.L.A. 235 (1989). Only two Mississippi cases have cited the revised statute, neither of them addressing the statute from a secured

Under present Mississippi statutes, a contract conveying an interest in timber to be cut should be treated as a "good" under the Uniform Commercial Code.[284] Because the contract pertains to realty, a party perfecting a secured interest in the transaction would be well advised to follow the requirements of the Uniform Commercial Code[285] pertaining to fixture filings[286] and file in both the land records and in the U.C.C. records.[287]

K. Encroachments

An encroachment is defined as "an intrusion or invasion on an adjoining property without benefit of an appurtenant easement."[288] Typically, encroachments are physical objects such as fences, walls, trees, and foundations that extend beyond the property line of one landowner onto, into, over, or under the property line of an adjoining landowner.[289] An encroachment is most often remedied when the owner of the land encroached

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transaction point of view. *See* Bay Springs Forest Prods., Inc. v. Wade, 435 So. 2d 690, 694 (Miss. 1983) (discussing applicability of revised statute to transferor of timber in action to recover damages for wrongfully converted timber); Bell v. Hill Bros. Constr. Co., 419 So. 2d 575, 578 n.1 (Miss. 1982) (citing statute in discussion of whether statute of frauds applied to revocable license). This amendment was consistent with the amendment on the same date to MISS. CODE ANN. § 75-9-105(h) (1972) defining "goods" as including "standing timber which is to be cut and removed under conveyance or contract for sale."

[284] MISS. CODE ANN. § 75-9-105(h) (1972).

[285] *See* MISS. CODE ANN. § 75-9-401(1)(b) (Supp. 1989) (filing should be made in office where a mortgage would be filed when collateral is timber to be cut).

[286] MISS. CODE ANN. § 75-9-313 (1972). This statute concerns the priority of secured interests in fixture filings. MISS. CODE ANN. § 75-9-402 (1972) provides the formal requisites of a financing statement and specifies that, where the statement is one "covering timber to be cut," it must be filed for record in the real estate records, contain a sufficient description of the real estate, and provide the name of the record owner or lessee if different from the debtor. *Id.*

[287] *See* MISS. CODE ANN. § 75-9-401(1)(c) (Supp. 1989) (providing for dual filing in office of chancery clerk of appropriate county and office of secretary of state).

[288] 2 C.J.S. *Adjoining Landowners* § 41 (1965).

[289] *See* Trotter v. Gaddis & McLaurin, Inc., 452 So. 2d 453, 455 (Miss. 1984) (fence); Eady v. Eady, 362 So. 2d 830, 831 (Miss. 1978) (fence); Allen v. Thomas, 215 So. 2d 882, 883 (Miss. 1968) (fence); Berry v. Houston, 195 So. 2d 515, 516 (Miss. 1967) (blacksmith shop and timber-bordered garden); Mason v. Gaddis Farm, Inc., 230 Miss. 666, 93 So. 2d 629, 631-32 (Miss. 1957) (barbed-wire fence); Snowden & McSweeny v. Hanley, 195 Miss. 682, 16 So. 2d 24, 25 (1943) (hedgerow).

upon files an action to clear title.[290]

The duty to prevent the encroachment is not on the victim, but rather on the encroacher.[291] Nevertheless, the victim who passively observes the construction of an encroachment may be estopped from later exercising his legal rights against his encroaching neighbor.[292] When such a landowner is estopped from exercising his right to protect his property, the adjoining landowner does not necessarily gain title to the land upon which the encroachment rests.[293] When the original entry was not adverse to the rights of the legal owner, no title passes because of the encroachment.[294]

Encroachments often ripen into adverse possession.[295] Mississippi courts place the burden of proving adverse possession on the non-record title holder[296] The adverse claimant must prove that the property was held openly, notoriously, visibly, exclusively, and for a continuous and uninterrupted period of ten years.[297]

In applying the elements of adverse possession, a court will

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[290] *See, e.g., Trotter*, 452 So. 2d at 454; Ford v. Rhymes, 233 Miss. 651, 103 So. 2d 363, 364 (1958).

[291] 2 C.J.S., *supra* note 288, § 42.

[292] Bright v. Michel, 137 So. 2d 155, 159 (Miss. 1962).

[293] *See* Johnson v. Black, 469 So. 2d 88, 91 (Miss. 1985) (possession with permission of record title holder is never sufficient in and of itself to establish adverse possession and ripen into title in adverse possessor, no matter how long it continues).

[294] *See* St. Regis Pulp & Paper Corp. v. Floyd, 238 So. 2d 740, 743 (Miss. 1970) (adverse possession claim cannot be based upon possession alone); Moore v. Crosby Chemicals, Inc., 227 Miss. 786, 86 So. 2d 869, 870 (1956) (original permissive entry continues until hostile act); Williams v. Patterson, 198 Miss. 120, 21 So. 2d 477, 480 (1945) (positive assertion of hostile right necessary for adverse possession claim).

[295] *Trotter*, 452 So. 2d at 455. Adverse possession does not require an enclosure of or an improvement on the land. Occupancy or use is sufficient to establish adverse possession, but enclosures or improvements are more persuasive evidence. V. GRIFFITH, OUTLINES OF THE LAW 165 (1948).

[296] *See* Roy v. Kaiser, 501 So. 2d 1110, 1111 (Miss. 1987); Gadd v. Stone, 459 So. 2d 773, 774 (Miss. 1984); Georgia Pac. Corp. v. Blalock, 389 So. 2d 498, 502 (Miss. 1980); Eady v. Eady, 362 So. 2d 830, 832 (Miss. 1978).

[297] *See* McNeely v. Jacks, 526 So. 2d 541, 544 (Miss. 1988) (elements of adverse possession); Roy v. Kayser, 501 So. 2d 1110, 1111 (Miss. 1987) (noting burden carried by adverse possession claimant under Mississippi law); MISS. CODE ANN. § 15-1-13 (1972) (10 years adverse possession gives full and complete title except against persons under disability who lose title 10 years from date of removal of their disability or 31 years from date of adverse possession, whichever first occurs).

look to the specific facts of each case, particularly the character of the land involved, in order to ensure that a title holder will not be disseised of property without his knowledge. Courts are also careful to ensure that the statute of limitations will not run against an owner who had no reason to believe that seisin had been interrupted.[298] When timberland is the subject of an adverse possession suit, courts have looked to a number of factors in determining whether occupancy by a party is sufficient to establish acts of ownership. These factors include: (1) surveying the land;[299] (2) identifying the boundaries by painting trees, blazing trees, or staking corners;[300] (3) posting the property;[301] (4) fencing the property;[302] (5) using the land for farming or cattle purposes;[303] (6) hunting on the property, granting hunting leases, reserving hunting rights or evicting hunters, and arresting poachers;[304] (7) paying taxes;[305] (8) establishing pre-suppression fire lanes or fire guards;[306] (9) planting or transplanting trees;[307] (10) cutting trees or utilizing wood products;[308] and (11) placing mortgages on the property, offering it for sale, or granting oil

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[298] McMahon v. Yazoo Delta Lumber Co., 92 Miss. 459, 464-65, 43 So. 957, 958 (1907).

[299] Grantham v. Masonite, 218 Miss. 745, 749, 67 So. 2d 727, 728 (1953) (cited with approval in Moffett v. International Paper Co., 243 Miss. 562, 564, 139 So. 2d 655, 656 (1962)).

[300] Houston v. United States Gypsum Co., 652 F.2d 467, 471 (5th Cir. 1981); *Grantham*, 67 So. 2d at 728.

[301] *Houston*, 652 F.2d at 471; *Grantham*, 67 So. 2d at 728.

[302] *Houston*, 652 F.2d at 471; Anderson Tully Co. v. Walls, 226 F. Supp. 804, 811 (N.D. Miss. 1967); Mathieu v. Crosby Lumber & Mfg. Co., 210 Miss. 484, 492, 40 So. 2d 894, 896 (1962).

[303] *Houston*, 652 F.2d at 471; *Anderson Tully Co.*, 226 F. Supp. at 811; *Mathieu*, 40 So. 2d at 896.

[304] *Houston*, 652 F.2d at 471; *Anderson Tully Co.*, 226 F. Supp. at 811.

[305] Broadus v. Hickman, 210 Miss. 885, 886-87, 50 So. 2d 717, 718 (1951); Native Lumber Co. v. Elmer, 117 Miss. 720, 733, 78 So. 703, 705 (1918); Southern Pine Co. v. Pigott, 93 Miss. 281, 286, 47 So. 381, 382 (1908); A.W. Stevens Lumber Co. v. Hughes, 88 Miss. 884, 38 So. 769, 770 (1905); McCaughn v. Young, 85 Miss. 277, 292-93, 37 So. 839, 842 (1905).

[306] *Broadus*, 50 So. 2d at 719.

[307] *Houston*, 652 F.2d at 471; *Broadus*, 50 So. 2d at 719.

[308] *Broadus*, 50 So. 2d at 719; *Mathieu*, 40 So. 2d at 896; *Native Lumber Co.*, 78 So. at 705; Dedeaux v. Bayou Delisle Lumber Co., 112 Miss. 325, 329, 73 So. 53, 54 (1916); *A.W. Stevens Lumber Co.*, 38 So. at 770; *McCaughn*, 37 So. at 842.

and gas leases.[309]

Adverse possession runs only against the possessory interest,[310] which, in the case of leased property, is held by the tenant.[311] Thus any encroachment ripening into adverse possession against a tenant does not injure the reversionary interest of the landlord[312] unless the landlord had unequivocal notice of the adverse possession.[313]

L. Weights and Measures

In Mississippi, pulpwood can be sold by volume measured in cords[314] or by weight measured in tons.[315] In converting volume to weight, the factors to be used under state law are 5,200 pounds per pine cord, 5,400 pounds per soft hardwood cord, 5,600 pounds per mixed hardwood cord and 5,800 pounds per hard hardwood cord.[316] According to the Mississippi statute, sawlogs and square timber are required to be measured by the table known as "Scribner's Lumber and Log-book by Doyle's Rule."[317] The use of the international log rule[318] or any other

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[309] *Houston*, 652 F.2d at 471; *McCaughn*, 37 So. at 842.

[310] *See* Breeden v. Tucker, 533 So. 2d 1108, 1110 (Miss. 1988) (adverse possession does not begin to run against owner of reversionary interest until death of owner of life estate who was in sole possession of property).

[311] *See* Standard Fruit & S.S. Co. v. Putnam, 290 So. 2d 612, 615 (Miss. 1974) (no right of possession or use remaining in lessor); Collins v. Wheeless, 171 Miss. 263, 267, 157 So. 82, 83 (Miss. 1934) (possession interest in leasehold belongs to tenant).

[312] *See* Foster v. Jefferson County, 202 Miss. 629, 639, 32 So. 2d 126 (1947) (lease would have precluded running of statute of limitations for adverse possession); Weiler v. Monroe County, 76 Miss. 492, 495, 25 So. 352, 353 (Miss. 1899) (statute of limitations for adverse possession does not run against reversion).

[313] Monaghan v. Wagner, 487 So. 2d 815, 819 (Miss. 1986). The adverse possession must put the true owner on notice that the land is being held against his ownership. Snowden & McSweeny Co. v. Hanley, 16 So. 2d 24, 25 (1943).

[314] *See* MISS. CODE ANN. § 75-27-7 (1972) (defines term "cord" as amount contained in space of 128 cubic feet when ranked and well stowed).

[315] *Id.* A ton is a unit of measurement of 2,000 pounds avoirdupois weight. *Id.*

[316] MISS. CODE ANN. § 75-27-39 (Supp. 1989).

[317] MISS. CODE ANN. § 75-27-113 (1972); *see* T.E. AVERY, NATURAL RESOURCES MEASUREMENTS 130-40 (2d ed. 1975). Around 1846 N.J. Scribner developed the Scribner log rule. *Id.* It was derived from a diagram of one-inch boards drawn to scale within various size cylinders. *Id.* A presumption was allowed for a one-quarter inch saw kerf. *Id.* The minimum board width appears to have been four inches. *Id.* No taper allowance was included. *Id.* Scribner rule has been considered to be "intermediate in accuracy." *Id.* It normally underscales logs unless the maximum scaling length is 16 feet. *Id.* It does not

measurement is unlawful if that rule gives a smaller number of feet in a given log than that provided under the Scribner's Lumber and Log-book by Doyle's Rule.[319] Persons using other rules of measurement can be convicted of a misdemeanor and/or subject to liability to the injured party for triple damages.[320]

The Mississippi Uniform Pulpwood Scaling and Practices Act was adopted in 1982 to ensure that acceptable standards of scaling pulpwood were applied uniformly throughout the state.[321] The Act authorized the Commission of Agriculture and Commerce to license operators of pulpwood receiving facilities,[322] establish standard procedures and regulations for measuring pulpwood by weight and volume,[323] conduct periodic inspections,[324] and handle complaints concerning violations of the Act.[325] Criminal penalties[326] are provided for persons who oper-

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provide board foot volumes that are consistent with changing log diameters. *Id.* The Scribner decimal C log rule rounds Scribner volumes to the nearest 10 board feet and drops the last zero. *Id.* That rule is the official rule of the U.S. Forest Service in the Western United States. *Id.*

About 1825, Edward Doyle devised the Doyle log rule. *Id.* at 140. That rule has been a predominant unit of measurement in the Southern and Eastern United States. *Id.* The rule is based on a slabbing allowance of four inches and a five-sixteenth inch saw kerf. *Id.* The mathematical formula upon which the rule is based is algebraically incorrect. *Id.* The application of the Doyle log rule results in greatly underscaling small logs and overscaling large logs. *Id.*

[318] T.E. AVERY, *supra* note 317, at 140-41. About 1906, Judson Clark developed the international log rule. *Id.* It is the only log rule in common use that makes an allowance for the reduction in the diameter of a tree or log from the base to the top. *Id.* The original international log rule assumed a one-eighth inch saw kerf and a one-sixteenth inch allowance for board shrinkage. *Id.* The international one-quarter inch rule provides for a one-quarter inch saw kerf plus one-sixteenth inch for shrinkage. *Id.* 212 inch thick and log diameter width slaps are deduced in the form of an imaginary plant. *Id.* The one-eighth inch international rule has been modified for saw mills employing a one-quarter inch kerf by a reduction by the converting factor of .905. *Id.* The international rule has been generally observed as the most consistent, has been officially adopted by several states, and is widely used in the U.S. forest survey. *Id.*

[319] MISS. CODE ANN. § 75-27-113 (1972).

[320] *Id.*

[321] *Id.* § 75-79-3 (Supp. 1989).

[322] *See id.* § 75-79-5(e) (Supp. 1989) (any woodyard, pulp mill or other place of business at which pulpwood is received from pulpwood cutter-haulers in regular course of business).

[323] *Id.* § 75-79-7.

[324] *Id.*

[325] *Id.*

[326] *See id.* § 75-79-19 (Supp. 1989) (up to $1,000 for first conviction and up to $5,000

ate pulpwood receiving facilities without a license; and an administrative procedure is established by the Act to deny, revoke or suspend a license for cause.[327]

The State of Mississippi has enacted legislation governing the size, weight, and load of vehicles on its highways. Boards of county supervisors may impose more restrictive limitations on county roads than those provided for state roads.[328] Under state law generally, the width of vehicles is limited to eight and one-half feet,[329] and the height of vehicles is limited to thirteen feet, six inches.[330] The allowable length of vehicles varies, depending upon the type of vehicle. Forest products transported on a vehicle may not project more than twenty-eight feet beyond the rear axle unless the contents of the vehicle are special products, such as tall poles, and a permit has been obtained before transporting the products.[331] Also, any vehicle transporting a load that projects from the rear axle may operate only during daylight hours.[332] Vehicles transporting forestry products must be secured by chains or wire ropes positioned behind the front bolster

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for subsequent convictions).

[327] *Id.* § 75-79-21.

[328] *See* MISS. CODE ANN. § 63-5-27(5) (Supp. 1989) (limitations may be imposed by appropriate resolution by board of supervisors of any county or governing authorities of any municipality); *id.* § 65-7-43 (Supp. 1989) (board of supervisors shall have power to protect their roads and bridges from any unusual or uncommon use that is likely to injure or impair their usefulness as public highways and may recover damages for injuries); *id* § 65-7-45 (board of supervisors may regulate maximum load of vehicles, section of length of public road or particular bridge used by vehicles by an order spread on its minutes that is effective after publication for three consecutive weeks in newspaper published in county); *see also* Waste Control, Inc. v. Tart, 506 So. 2d 286, 287-89 (Miss. 1987) (board of supervisors' resolution restricting weight to 30,000 pounds was within its police power to regulate weight limits to protect and promote public health, safety, morality and welfare, was not oppressive, arbitrary, or discriminatory, and was appropriately enforced by lower court).

[329] MISS. CODE ANN. § 63-5-13 (Supp. 1989).

[330] *See id.* § 63-5-17 (1972) (although maximum height is established at thirteen feet six inches, no person, firm, corporation, or municipality is required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle or other structure to permit passage of vehicle whose height exceeds twelve feet six inches).

[331] *See id.* § 63-5-51 (1972) (permits for excess size and weight can be issued by State Highway Commission or local authorities upon written application and upon showing of good cause).

[332] *Id.* § 63-5-19(5) (Supp. 1989).

and in front of the back bolster.[333]

The weight limitations placed upon vehicles vary according to the wheel and axle loads of the vehicle. There are maximum loads established by state law, based upon the distance between the extreme of any group of axles and the total combined weight of the vehicle and the load, which vary according to the number of axles and the distance between the extreme group of axles.[334] Police officers, highway patrolmen, or other authorized enforcement officers of the State Tax Commission have authority to require a driver to stop his vehicle and submit it to weighing if the officer has reason to believe the weight of the vehicle and load is unlawful.[335] Failure to stop and submit to weighing could subject the driver to a misdemeanor charge punishable by a $1,000 fine.[336] This penalty is in addition to statutory penalties for exceeding the gross weight allowed under Mississippi law.[337]

M. The Potential for Litigation over "Good Forestry Practice" Provisions in Timber Documents

1. The Use of the Term "Good Forestry Practice"

"Good forestry practice" is a term found in many industrial forestry leases. Fifty percent of the companies responding to the industrial forestry questionnaire require adherence to good forestry practice in their form leases, and ninety-five percent of the companies utilize such provisions in form timber contracts and deeds. Other forestry companies may use this term to fit the circumstances of particular leases, deeds, or cutting contracts. "Good forestry practice" is not a term of art among professional foresters; the genesis of the term is unknown.[338] The interpretation of good forestry practice should be undertaken in light of

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[333] *Id.* § 63-5-19 (Supp. 1989).

[334] *Id.* §§ 63-5-27, -29, -33 (Supp. 1989).

[335] *Id.* § 63-5-49 (Supp. 1989).

[336] *Id.*

[337] *Id.* § 27-19-89 (Supp. 1989) ($10 minimum penalty for one pound overweight with graduated scale of up to 11 cents per pound penalty for exceeding legal weight limits).

[338] *See* SOCIETY OF AMERICAN FORESTERS, *supra* note 17 ("good forest practice" not defined in glossary of technical terms used in publications of Society of American Foresters).

the contract itself, as well as applicable statutory and case law.

The meaning of the term "good forestry practice" can be affected by the geographic location of the lands that are subject to the contract. In the West, the term could refer to specific forest practices statutes.[339] Such statutes traditionally create forest practices regulation and establish minimum standards for forest practices.[340] Some statutes classify practices according to their direct potential for damaging a public resource and require the submission of applications, plans, or detailed statements outlining forest activity.[341] These statutes, their constitutionality, and the changing requirements for receiving a permit have been the subject of litigation in Western states for almost 40 years.[342]

Because such forestry practices acts are foreign to timber industries having holdings only in Mississippi, the term "good forest practice" may have an entirely different meaning to industrial forestry companies in this state. Mississippi statutes provide few restrictions on a forest owner's right to harvest, regenerate, or manage lands and timber.

Although Mississippi adopted the Forest Harvesting Act[343] in 1944, the Act largely served to provide minimum protective measures pertaining to forest regeneration[344] and to intensify

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[339] *See, e.g.* Forest Practices Act of the State of Washington, WASH. REV. CODE § 76.09.010-.935 (Supp. 1989).

[340] *See, e.g., id.* § 76.09.040.

[341] *See, e.g., id.* § 76.09.050.

[342] *See, e.g.,* West Norman Timber, Inc. v. State, 224 P.2d 635 (Wash. 1950) (effect of changing requirements upon activities planned prior to change); State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906 (1949) (constitutionality upheld). *See generally* Annotation, *Constitutionality of Reforestation or Forest Conservation Legislation*, 13 A.L.R.2d 1081 (1950).

[343] 1944 Miss. Laws § 2, ch. 240 (codified at MISS. CODE ANN. § 49-19-51 to -71 (1972)). The Forest Harvesting Act has never been cited in any reported decision. It was amended only once, in 1974, for the clerical purpose of substituting the words "conservation officer" for "game warden" and to make specific reference to the statutes subject to violation. *Id.* § 49-19-73 (Supp. 1989).

[344] MISS. CODE ANN. § 49-19-53 (1972). If trees less than 10" DBH were harvested from a 40-acre tract, the statutes imposed a requirement of leaving 100 or more well distributed pine trees 4" in diameter or 4 pine seed trees of 10" or more in diameter on each acre containing pine trees, 100 or more well distributed hardwood trees of 4" or more DHB or at least 6 hardwood species of 10" or more in diameter on acres containing hardwoods or 4 pine seed trees of 10" or more in diameter along with at least 2 hardwood seed trees of 10" or more in diameter. *Id.* §§ 49-19-57 to -61. The same chapter contains

public education of landowners regarding forestry.[345] The Forest Harvesting Act contains provisions for enforcement by injunction[346] and provides criminal penalties that include fines of not less than $25 and not more than $50 for each separate offense.[347] Enforcement of the statute rests with the Mississippi Forestry Commission.[348] The Commission may work in cooperation with sheriffs, constables, conservation officers, district attorneys and county prosecuting attorneys who are to report violations to the Forestry Commission.[349] Violations may also be investigated by the grand juries of each county.[350]

Another Mississippi statute utilizes the term "approved practice."[351] Because that act is is expressly limited to non-industrial landowners,[352] the term does not shed any light on the meaning of good forestry practice among industrial forestry companies.

Mississippi case law does not serve as a basis for defining the term "good forestry practice."[353] Although at least one Mis-

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a requirement of leaving 100 or more well distributed trees 4" or more in diameter or 4 seed trees of 10" or more in diameter if trees are to be cut for new faces for naval store purposes. *Id.* § 49-19-55. Seed trees are defined under the statute as "thrifty trees" of desirable species with well formed crowns, uninjured from tapping, cutting or logging operations and as well distributed over the acres as is possible. *Id.* § 49-19-63.

[345] NATIONAL ASSOC. OF STATE FORESTERS, *supra* note 9, at 476; *see also* MISS. CODE ANN. § 49-19-53 (1972) (stated legislative policy of Act recognized that only small portion of private forest land was managed in accordance with "sound forestry practices," thus creating waste, inefficiency and destruction of forest lands and resulting in serious economic and social loss).

[346] MISS. CODE ANN. § 49-19-71 (1972).

[347] *Id.* § 49-19-75.

[348] *Id.*

[348] *Id.* § 49-19-73 (Supp. 1989).

[350] *Id.*

[351] *Id.* §§ 49-19-201 to -207 (Supp. 1989). "Approved practice" is a term utilized in the Forest Resource Development Law of 1974. *Id.* That law declares that the development of forest resources is a public policy of the state. *Id.* § 49-19-203. It provides for assistance for private non-industrial landowners for developing forest resources and receiving cost/share expense assistance for an "approved practice." *Id.*; *see, e.g., id.* §§ 49-19-213, -215(2), -217, 219(a), -219(b), -219(c), -219(e), -221(1), -223(2), -225.

[352] *Id.* § 49-19-205(c).

[353] While no reported Mississippi decision has directly tackled the meaning of a good forestry practice in a contract, decisions in other jurisdictions have analyzed long-term leases containing that phrase both in the context of the tax implications and forest practice implications.

sissippi case involved a contract that utilized the term "good forestry practice," that term was not defined in the case, nor did it involve the court's decision.[354] Another Mississippi case utilized the term "good forestry practices,"[355] but the term again had no significance to the outcome of the suit.

In *Treatt v. Rushing*,[356] the defendant raised the issue of good forestry practice and argued that his right to cut timber from property owned by co-tenants was based upon the theory that cutting mature timber was "good husbandry" and not a waste on the land.[357] In rejecting the argument, the court focused upon whether cutting was detrimental to the chief estate or inheritance of the other co-tenants rather than upon the specific forestry practice of thinning.[358] The holder of the life estate had claimed that the timber needed to be thinned in order to avoid a loss of profits and had utilized "thinning" to cut out mature trees and leave a stand that could reseed.[359] Neither the question of whether the life estate tenant was "thinning" or conducting a select cut nor the effects of either type of harvest upon the remaining forest were discussed by the court.

The term "good reforestation" was used in *Broadus v. Hickman*,[360] a civil suit to quiet title that addressed issues of adverse possession.[361] In that case, the party asserting title by adverse possession claimed to have bought property from the state for the purposes of reforesting the property and testified regarding activities that could establish ownership, including transplanting young trees and making preparation on the land "as was required by good reforestation."[362] Although this testimony was

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[354] Patridge v. McAtee, 225 Miss. 141, 151-52, 82 So. 2d 711, 714 (1955) (action for reformation of contract for purchase and sale of timber and for damages turned upon whether parties had made mutual mistake or there was misrepresentation as to amount, quality or quantity of marked trees to be sold under contract).

[355] Barlow v. Rutland, 252 Miss. 400, 174 So. 2d 361, 364 (1965) (party contended that timber had to be cut from land subject to partition suit to conform to "good forestry practice" in preparing land for permanent pasture).

[356] 361 So. 2d 329 (Miss. 1978).

[357] *Treatt*, 361 So. 2d at 331.

[358] *Id.*

[358] *Id.* at 330.

[360] 210 Miss. 885, 891, 50 So. 2d 717 (1951).

[361] *Broadus*, 210 Miss. at 891, 50 So. 2d at 719.

[362] *Id.*

instrumental in the court's decision that adverse possession had been established, the case did not analyze what constituted good forestry practice or good reforestation.

Thus, Mississippi courts have not imposed specific duties upon landowners by defining the term "good forestry practice." The courts have, however, recognized that the creation of contractual relationships, including those arising out of timber deeds, imposes a duty upon those exercising cutting and removal rights to utilize "due and reasonable care" not to injure the property of landowners unnecessarily.[363] The owner of land and the owner of timber hold their interests in severalty, and their relationship does not rise to the status of a tenancy in common.[364]

Although no reported Mississippi decision has directly tackled the meaning of a good forestry practice phrase in a contract, decisions outside this state have analyzed long-term leases containing that phrase in the context of their tax implications for both parties and specific and general forest practice obligations. The tax cases turn upon whether the contract leases allow the taxpayers to retain an economic interest in the annual growth of timber and to qualify thus for capital gain treatment as a sale.[365]

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[363] *See* D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 1 So. 2d 770, 772 (1944) (lumber company owning timber on land leased by owners using land as pasture has duty to use reasonable care not to unnecessarily injure improvements on lands).

[364] *See* Day v. Hogans, 130 Miss. 128, 93 So. 578, 579 (1922) (noting that relationship between owner of land and owner of timber was not that of tenants in common); Annotation, *Rights and Duties As Between Owner of Land and Owner of Timber or of Minerals in Place as Regards Liens Covering Both Interests*, 26 A.L.R. 1031 (1923). Under Mississippi law, tenants in common have a fiduciary relationship creating a presumption that "the acts of a co-tenant in possession are for the benefit of, and not contrary to, the interests of the other co-tenants." Bayless v. Alexander, 245 So. 2d 17, 20 (Miss. 1971).

[365] *See* Dyal v. United States, 342 F.2d 248, 254 (5th Cir. 1965) (taxpayer is entitled to capital gain treatment for payments of fair market value of timber in existence at time of execution of contract but not for timber that came into existence during time in which cutting was prohibited by terms of contract). These cases generally involve application of Revenue Ruling 62-81, 1962-1 C.B. 153 and Revenue Ruling 62-82, 1962-1 C.B. 155. *Dyal* involved a contract between Union Bag-Camp Paper Corporation and an owner of a timberland. Union Camp obligated itself to pay for timber at a fixed rate, per cord, per year, or estimated annual growth, to manage and operate the land with good forestry practices, to insure that average growth would not be less than the amount of timber cut and removed, to pay ad valorem taxes and to take other action which granted it full

Other tax cases consider whether expenses incurred by timber companies under long-term leases, including annual payments, payment of taxes, and other expenses, are ordinary, necessary expenses to be deducted or are part of the cost of timber which should be capitalized and offset against income realized when timber is cut.[366]

Relatively few cases have actually analyzed the use of the term "good forestry practice" and the rights of the parties under agreements utilizing that term. In *Dyal v. Union Bag-Camp Paper Corp.*,[367] the court reversed the grant of a summary judgment in favor of Union Bag-Camp against trustees for the timber owners.[368] The lease required Union Camp to pay taxes and to contribute annually to a forest management fund for the maintenance of fire lands, fire warden service, and sound forestry practices.[369] After entering the agreement, the trustees denied Union Camp's claim that sound forestry practices would require the removal of 100,000 cords of beetle-infested timber by clearcutting.[370] Although Union Camp's duty to remove the trees was undisputed, the parties differed on the question of whether Union Camp's removal of the trees was required by proper forestry practices.[371] Because the forestry practices utilized in harvesting timber infested with pine beetle could affect the accounting for "annual cutting" based upon prior growth and "extras" for damaged trees and fuel wood, the landowners had a direct interest in the issue of good forestry practice; and sum-

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beneficial possession of the surface to an extent not detrimental to timber growth. Based upon these facts, the service ruled the landowner did not possess a retained economic interest in the timber. *Dyal*, 342 F.2d at 249-50. Where the payments were lump sum payments, the service determined that the taxpayer was entitled to capital gains only for the portion of the payment for the fair market value of existing timber with the remainder of the lump sum payment being in the nature of consideration for the use of land over a period of time and therefore ordinary income. *Id.* at 253.

[366] *See* Union Bag-Camp Corp. v. United States, 325 F.2d 730, 743-44 (Ct. Cl. 1963) (amounts paid by forestry company for taxes and forest management and to lessor constituted rentals and were deductible from lessee's gross income in their entirety).

[367] 263 F.2d 387 (5th Cir. 1959).

[368] *Dyal*, 263 F.2d at 393-94.

[369] *Id.*

[370] *Id.*

[371] *Id.* at 394.

mary judgment was therefore held to be improper.[372]

The issue of good forestry practice may extend beyond the common-law duty of a lessee with cutting rights to balance his rights with the rights of the landowner. In those cases where the landowner had surface rights for cattle grazing, deer and wildlife habitat, or other surface purposes, some courts have imposed restrictions on the rights of the timber companies in order to protect the surface rights of the landowner.[373]

"Good forest practice" or similar terms have also appeared in various reported decisions involving Indian reservation lands and the resource management plans developed for such lands under various federal acts such as the "Forest and Rangeland Renewable Resources Planning Act of 1974"[374] and the "Multiple-Use Sustained-Yield Act of 1960."[375] However, the cases interpreting these statutes do not aid in the analysis of good forest practice provisions in leases among private landowners and industrial forestry companies.

2. Rules of Construction in Interpreting a Contract

The first rule of contract interpretation is to give effect to the intent of the parties to the contract.[376] In determining the intention of the parties, courts look at the words utilized by the parties, since the words actually employed in the contract are the best resource for determining the intent and assigning a fair and accurate meaning to the agreement.[377] Thus a court will interpret an agreement solely according to its terms unless a careful reading of the instrument reveals it to be ambiguous, in

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[372] *Id.* at 391 n.8, 394.

[373] Baca Land & Cattle Co. v. Savage, 440 F.2d 867, 872, 873 (10th Cir. 1971) (citing D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So. 2d 770 (1944)) (ownership of forest growth entitled timber owner to cut and remove timber even though removal involves certain amount of injury to land, but those rights must be balanced against landowner's rights to use land for cattle purposes, to have timber company minimize erosion and preserve roads for later use and to arrange slash and debris in manner on ground in which it will deteriorate).

[374] 16 U.S.C. §§ 1600-1687 (1983).

[375] 16 U.S.C. §§ 528-531 (1983).

[376] Estate of Hensley v. Estate of Hensley, 524 So. 2d 325, 327 (Miss. 1988).

[377] UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., 525 So. 2d 746, 754, *reh'g dismissed*, 525 So. 2d 758, 759 (Miss. 1987).

which case the court may resort to extrinsic evidence to determine intent.[378]

General rules of construction utilized by a court in contract interpretation include the following principles:

(1) Vague or ambiguous contracts are always construed more strongly against the party preparing them;[379]

(2) If two clauses conflict, the dominant clause should be enforced;[380]

(3) Written portions prevail over printed material;[381]

(4) Laws in force at the time a contract is made are incorporated into the contract as if expressly included in the contract language;[382]

(5) The construction which the parties place on a contract and the acts they consistently perform under the contract are evidence of the requirements of the contract;[383]

(6) Words of a contract are given their ordinary meaning;[384]

(7) A contract will be construed to give effect to all the provisions and produce fair and reasonable results;[385]

(8) If two clauses of a contract cannot be reasonably construed together, the first will prevail;[386] and

(9) Specific provisions prevail over general provisions.[387]

The construction of contracts utilizing the term "good forestry practice" or other similar terms will be subject to these general rules of construction. Practical difficulties may arise, however, where attempts to construe the contract occur years after its creation. Since long-term timber leases are frequently effective for up to ninety-nine years, all or some of the parties to

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[378] Barnett v. Getty Oil Co., 266 So. 2d 581, 586 (Miss. 1972).

[379] Stampley v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976).

[380] Nicholas Acoustics & Specialty Co. v. H.M. Constr. Co., 695 F.2d 839, 843 (5th Cir. 1983).

[381] Dale v. Case, 217 Miss. 298, 310, 64 So. 2d 344, 349 (1953).

[382] Mississippi Valley Gas Co. v. Boydstun, 230 Miss. 11, 31, 92 So. 2d 334, 340 (1957).

[383] Delta Wildlife & Forestry, Inc. v. Bear Kelso Plantation, Inc., 281 So. 2d 683, 686 (Miss. 1973).

[384] Owen v. Gerity, 422 So. 2d 284, 288 (Miss. 1982).

[385] Glantz Contracting Co. v. General Elec. Co., 379 So. 2d 912, 917 (Miss. 1980).

[386] Martin v. Adams, 216 Miss. 270, 276, 62 So. 2d 328, 329 (1953).

[387] Garrett v. Hart, 250 Miss. 822, 834-35, 168 So. 2d 497, 502 (1964).

the original agreement may have died by the time questions arise concerning interpretation. In such instances, evidence of the actions of the parties over the years of the agreement provides the strongest extrinsic proof of intent.

Agreements utilizing "good forestry practice" or similar terms can also raise pragmatic problems of proof concerning what constitutes good forestry practice. A threshold question concerns the effect that passage of time may have on interpreting the good forestry practice provision of the contract.[388] The court must decide this factual issue by determining the intent of the parties as to the subject matter of the contract at the time the contract was made.[389] With the significant evolution of forestry practice, the resolution of this question could profoundly affect the court's decision as to what constitutes a specific forestry practice.

3. *Crosby* and the Potential for Litigation

During the summer of 1980, what could have been Mississippi's first case to interpret the phrase "good forestry practice" was filed in the United States District Court for the Southern District of Mississippi, Southern Division. That case, *St. Regis Paper Co. v. Crosby*,[390] was a consolidated action in which St. Regis sued and was sued by the landowner over alleged lease and contractual violations.[391] The term "good forest practice"

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[388] Some contracts containing good forest practice language specify that management and operations of lands and utilization of the timber is to be "in accordance with good forestry practices from time to time prevailing." *See, e.g.*, St. Regis Paper Co. v. Aultman, 280 F. Supp. 500 (M.D. Ga. 1967), *aff'd per curiam*, 390 F.2d 878 (5th Cir. 1968).

[389] *See* McCain v. Giersch, 112 F.2d 70, 72 (5th Cir. 1940) (in determining intent of parties, court places itself in position of parties at time contract was executed and does not consider events occurring thereafter); Hunt v. Gardner, 147 Miss. 374, 382-83, 112 So. 7, 8 (1927).

[390] That cause was pending as consolidated civil action number S80-0496(R).

[391] The agreements between the parties included a lease dated July, 1960, covering 110,000 acres of property in Hancock, Pearl River, Harrison, Lamar, Forrest, Walthall, and Marion Counties ("Lease"). Consideration for the lease was rental payment equal to ad valorem taxes, the obligation to manage and operate the lands "in accordance with good forest and conservation practices from time to time prevailing with respect to timber, soil and water." A second agreement consummated a sale of all timber growing and to be grown on the property with payments to be made at a rate adjusted with changes

was defined in the lease as "practices currently applied in privately owned timber producing projects . . . with respect to land having comparable terrain and climatic conditions . . . together with such new commercial forest practices as from time to time prevail and . . . [are] generally accepted in privately operated timber producing and growing projects."[392] Issues raised in the suit included alleged misutilization of timber, waste, failure to reforest, failure to salvage, failure to properly estimate the backlog, failure to make payments and failure to fulfill management duties.[393] Relief sought by the landowner included damages, an accounting, injunctive relief, and cancellation of the lease and agreement.[394] Ultimately, the case was settled, with all claims against St. Regis dismissed and the lease and contract cancelled.[395]

As is true in all complex civil litigation, the practical effect of having an industrial timber company's forestry practices on trial can be painful to all parties. The landowner must have the financial wherewithal to pay counsel and experts as they participate in theoretical, technological and applied aspects of silvicultural civil litigation. Industrial forestry companies must devote time, resources and manpower to defend a lawsuit rather than to make profits for their shareholders.

The detailed analysis of forestry practices implicit in an analysis of "good forestry practice" could lead to a plaintiff's discovery request for hundreds of thousands of pages of information pertaining to forest practices, all of which would require analysis by experts. The trial could present counsel with the

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in the wholesale price index for all commodities. Under that contact, St. Regis obligated itself to perform growth tabulation in 1964 and every five years thereafter and could cut that amount "in the exercise of good forest practices." St. Regis was to furnish books and records to Crosby reflecting the cutting and specific management plans and to fulfill other duties.

[392] Lease, at 5.

[393] *Id.*

[394] *Id.*

[395] Both sides claimed a victory in the settlement. The Crosbys claimed vindication through the release of their lands from long-term agreements. St. Regis claimed its forest practices were recognized as good by the dismissal of the suit. Because Crosby had an economic interest in the trees requiring St. Regis to pay for the value of the product, St. Regis claimed it could acquire fiber from outside sources at the same cost resulting in a savings of ad valorem tax payments and management costs.

challenge of comprehending complex forestry matters and communicating them in a manner that a jury could understand. Such a trial could potentially last for weeks, and the cost to all parties would be staggering.[396] In a complex forestry case, there may be no clear winner regardless of the terms of the settlement or the decision by a court or jury.

Crosby illustrates the potential for litigation concerning "good forestry practice" provisions. Such litigation will be shaped in part by whether or not that term explicitly defines or requires specific duties of the parties.

In the interpretation of an undefined "good forestry practice" phrase in a timber contract, the initial inquiry should focus on the specific ownership interests in the land, timber and forest products and the rights concerning use of the premises. This approach may serve to keep any "good forest practice" obligation in perspective with the legal relationship of the parties and the agreement as a whole. A landowner retaining an economic interest in the trees and rights to use of the land will be more affected by timber operations than one who sells the trees, receives a lump sum payment and retains only a reversionary interest under a long-term lease.

The specific obligations and rights of the parties under the instrument should also be analyzed. Enumerated restrictions on the timber company's right to harvest, obligations to reforest and other specific limitations upon forestry practice can shed light upon the meaning of good forestry practice provisions.

Use of undefined "good forestry practice" terminology in leases and contracts should be carefully considered by industrial forestry companies. The potential for litigation connected with the use of such vague terms must be recognized at all times, and any agreement should be carefully reviewed by all attorneys concerned to ensure that such provisions reflect a balancing of the parties' interests.

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[396] United States District Court Judge Donald E. Walther of the Western District of Louisiana recently referred to complex civil litigation as the "20th century version of trial by ordeal." "Deposition, Techniques, Tactics, Preparation and Ethics," *Judges Speak Out . . . and Listen!*, Tulane Continuing Legal Education, Grand Hotel, Point Clear, Alabama (May 31, 1989).

IV. Conclusion

The importance of the forestry industry to the State of Mississippi cannot be overstated. Continued investment in land, plants, and equipment promises that the timber industry will maintain its prominent position in the future economic growth of our state. Yet that prominence comes at a price, and the explosion of civil litigation currently felt by the business community as a whole has spread to the forest industry. The complexity of forestry-related issues and the practical difficulties in litigating such cases require that attorneys representing forestry companies, as well as attorneys representing individuals dealing with them, recognize the breadth of legal issues raised by timber transactions and practices. It is hoped that an understanding of issues currently confronting the timber industry will result in legal developments that enable industry and landowners to make the most productive use of this important natural resource.

APPENDIX

TIMBER LITIGATION QUESTIONNAIRE NATURAL RESOURCES SECTION OF THE MISSISSIPPI STATE BAR

Administrative Information:

Company name: _____

Company address: _____

Name and Title of person completing the questionnaire: _____

_____

Date of completion: _____

Geographic Information: Number of acres controlled, by state:

Alabama	_____	fee	_____	lease
Arkansas	_____	fee	_____	lease
Florida	_____	fee	_____	lease
Georgia	_____	fee	_____	lease
Louisiana	_____	fee	_____	lease
Mississippi	_____	fee	_____	lease
North Carolina	_____	fee	_____	lease
South Carolina	_____	fee	_____	lease
Tennessee	_____	fee	_____	lease
Texas	_____	fee	_____	lease

Litigation Issues (please rate these issues in timber litigation as F (frequent), S (seldom) or N (never).

___ Disease or Pest (uncontrolled spread)
___ Disputes (employee/independent contractor liability)
___ Encroachments (boundary disputes excluding wrongful timber cutting)
___ Environmental (chemical use, smoke from burning, waste disposal, wetlands restrictions, Clean Water Act)
___ Fire (wildfire or uncontrolled spread of control burn)
___ Independent Contractor
___ Land Use Restriction Regulation (zoning, taxing, etc.)
___ Management obligations (utilization of good forestry practices, requirements of standards of workmanlike manner, utilization of sound forestry practices or best management practices)
___ Migrant and Seasonal Worker Protection Act
___ OSHA
___ Pricing (scaling, volume and measurement)
___ Regeneration requirements (planting, seeding & natural)
___ Soil disturbance (rutting, compaction)

___ Trespass to timber (wrongful cutting of timber)
___ Utilization (product separation, waste)
___ Wildlife (hunting, fishing, recreation & other leases or uses)

TOTAL ALL STATE ACRES (LEASE & FEE)	17,699,708
ALL STATES LEASE	2,089,713
ALL STATES FEE	15,571,995
MISSISSIPPI LEASE	154,515
MISSISSIPPI FEE	873,196
TOTAL MISSISSIPPI ACRES	927,711
QUESTIONNAIRES SENT	157
29.3% response	
RESPONSES RECEIVED	46

TOPICS	ALL STATES BY # OF RESPONSES			ALL STATES WEIGHTED AVERAGE BY ACRES			ALL STATES WEIGHTED AVERAGE BY PERCENTAGE		
	TOTAL F	TOTAL S	TOTAL N	F ACRES	S ACRES	N ACRES	%F	%S	%N
DISEASE OR PEST	0	2	32	0	625000	17074708	0	3.5	96.5
DISPUTES	4	21	9	5205300	9630308	2327100	29.4	54.4	13.1
ENCROACHMENTS	2	22	10	5757500	11010608	931600	32.5	62.2	5.3
ENVIRONMENTAL	3	18	13	4709000	10033974	2956734	26.6	56.7	16.7
FIRE	2	22	10	983000	8540441	8176267	5.5	48.2	46.2
INDEPENDENT CONTRACTOR	1	19	14	996300	8846000	7857408	5.6	50	44.4
LAND USE RESTRICTION REGULATION	1	14	19	858000	9897263	6944445	4.8	55.9	39.2
MANAGEMENT OBLIGATIONS	1	14	19	500000	9406087	7793621	2.8	53.1	44
MIGRANT AND SEASONAL WORKER PROTECTION ACT	0	6	28	0	6130867	11568841	0	34.6	65.4
OSHA	2	8	24	3888000	3988129	9823579	22	22.5	55.5
PRICING	1	9	24	36000	7455480	10508228	0.2	42.1	59.4
REGENERATION REQUIREMENTS	0	12	22	0	5045480	12654228	0	28.5	71.5
SOIL DISTURBANCE	0	11	22	0	4913587	12741121	0	27.8	72
TRESPASS TO TIMBER	8	24	2	5806800	10989408	903500	32.8	62.1	51.
UTILIZATION	0	9	25	0	6270500	11429208	0	35.4	64.6
WILDLIFE	4	14	16	4983000	6024238	6692470	28.1	34	37.8

TOPICS	MISSISSIPPI BY # OF RESPONSES			MS WEIGHTED AVERAGE, ACRES			MS WEIGHTED AVERAGE, %		
	TOTAL F	TOTAL S	TOTAL N	ACRES F	ACRES S	ACRES N	%F	%S	%N
DISEASE OR PEST	0	0	7	0	0	927711	0	0	100
DISPUTES	2	4	1	244000	671711	12000	26.3	72.4	1.3
ENCROACHMENTS	3	4	0	256000	671711	0	27.6	72.4	0
ENVIRONMENTAL	1	6	0	41000	886711	0	4.4	85.6	0
FIRE	0	7	0	0	927711	0	0	100	0
INDEPENDENT CONTRACTOR	0	5	2	0	781826	145885	0	84.3	15.7
LAND USE RESTRICTION REGULATION	0	3	4	0	621000	306711	0	66.9	33.1
MANAGEMENT OBLIGATIONS	0	4	3	0	524885	402826	0	56.6	43.4
MIGRANT AND SEASONAL WORKER PROTECTION ACT	0	3	4	0	593826	333885	0	64	36
OSHA	2	2	3	244000	522334	161377	26.3	56.3	17.4
PRICING	0	3	4	0	391000	536711	0	42.1	57.9
REGENERATION REQUIREMENTS	0	2	5	0	159000	768711	0	17.1	82.9
SOIL DISTURBANCE	0	2	5	0	280885	646826	0	30.3	69.7
TRESPASS TO TIMBER	3	4	0	256000	671711	0	27.6	72.4	0
UTILIZATION	0	2	5	0	188000	739711	0	20.3	79.7
WILDLIFE	2	3	2	244000	172826	510885	26.3	18.6	55.1

TIMBER DEEDS — 29 RESPONSES

(5 MISS. RESPONSES)	MS ACRES	ALL STATES MS %	BY RESPONSE
DEED REQUIRES SOUND FORESTRY PRACTICE	244000	31.2	19
DEED DOES NOT REQUIRE SOUND FORESTRY PRACTICE	537826	68.8	10
DEED REQUIRES GOOD FORESTRY PRACTICE	391000	50.01	21
DEED DOES NOT REQUIRE GOOD FORESTRY PRACTICE	390826	49.99	8
TIMBERLAND AGREEMENTS — 16 RESPONSES			
(3 MISS. RESPONSES)			
TIMBERLAND MANAGEMENT AGREEMENT REQUIRES SOUND FORESTRY PRACTICE	203000	78.7	12
TIMBERLAND MANAGEMENT AGREEMENT DOES NOT REQUIRE SOUND FORESTRY PRACTICE	54826	21.3	4
TIMBERLAND MANAGMENT AGREEMENT REQUIRES GOOD FORESTRY PRACTICE	244000	94.6	13
TIMBERLAND MANAGEMENT AGREEMENT DOES NOT REQUIRE GOOD FORESTRY	13826	5.4	1

AN INTRODUCTION TO CIVIL FORFEITURE IN MISSISSIPPI: AN EFFECTIVE LAW ENFORCEMENT TOOL OR CASH REGISTER JUSTICE?

*Thomas E. Payne**

I. Introduction

Follow the money.[1]

The notion that love of money is the root of all evil is certainly not a new one; nor is the concept that greed is the driving force behind most criminal acts. Whether these perceived truisms are accurate statements reflecting our current moral status or merely perceptions fueled by a frustrated criminal justice system, we must conclude that economic gain is a primary motivator behind most of what we do on a daily basis. Unfortunately, for too many individuals the drive for money and economic gain is overpowering and all-encompassing; and many believe that the fast track to accumulating wealth is through illegal means.

The connection between economic gain and the motivation for individuals and organizations to be involved in unlawful activity is well understood by law enforcement authorities, but until recently some of the problems arising from this link had never been effectively or efficiently addressed. Law enforcement agencies historically have confronted criminal activity in a one-dimensional manner: they have typically waged a campaign only against the specific crime and individual criminal. Such an en-

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[1] This statement, which has been attributed to the Watergate informant "Deep Throat," advised reporters Woodward and Bernstein on the best method to track down the conspirators in the notorious Watergate break-in and subsequent cover-up.

forcement technique has proved effective against crimes such as murder, rape, and other violent criminal acts, as well as some lesser property crimes. However, such techniques have not been effective in dealing with economically motivated crimes and crimes perpetrated by organized criminal enterprises. It has become increasingly clear to law enforcement officials that crimes committed for pecuniary gain are not deterred solely by incarceration of the individual offender.

To meet the rising threat of such crimes, law enforcement officials have begun to resort to a method which makes the crime costly to the criminal in a literal sense—forfeiture. The definitions of the words "forfeit" and "forfeiture" provide a basis for understanding the concepts underlying the statutory law allowing the government to seize and forfeit property. The verb "forfeit" is said to derive from an old French word meaning "to commit a crime,"[2] and the term "forfeiture" has been defined as the taking by the government of property that is illegally used or acquired, without compensating the owner.[3]

Property once used or acquired by or for criminal means has long been intended by society to be forfeitable. Courts have recognized that forfeiture laws are necessary and designed, not only to punish, but also to remediate.

> Forfeiture of drugs, vehicles and money used in drug trafficking has many apparent remedial nonpunitive purposes. These include impeding the success of the criminal enterprise by eliminating its resources and instrumentalities, diminishing the efficiency and profitability of the business by increasing the cost and risk associated with it, and helping to finance the government's efforts to combat drug trafficking.[4]

Most forfeiture penalties are incurred through a violation of

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[2] D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 2.01, at 2-1 n.12 (1989).

[3] United States v. Eight (8) Rhodesian Stone Statutes, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

[4] United States v. $2,500 in United States Currency, 689 F.2d 10, 13 (2d Cir. 1982). The forfeiture provisions have been aimed at the instrumentalities of the drug trade with an intent to prevent their continued use. *Id.* at 14. The Attorney General has been authorized to retain forfeited property for official use or sell it and use the proceeds for equipping and financing law enforcement activities. *Id.*

the criminal law; however, they are implemented through a civil in rem proceeding. Thus, although the action is technically a civil one against property, it serves the criminal justice system.[5] This seemingly inconsistent mechanism can be traced to the origins of our present-day forfeiture law.

The historical foundation of forfeiture statutes can be traced to early Biblical teachings. "If an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten";[6] the ultimate forfeiture was to God. This biblical teaching evolved into the English common-law concept of a deodand.[7] The term "deodand" is derived from the Latin *Deo dandum*, which, loosely translated, means "to be given to God."[8] English common law promoted the fiction that inanimate objects could be guilty of an act against society. The value of the object directly or indirectly causing the death of a king's subject was forfeited to the crown.[9] The deodand institution was abolished in England in 1846, when England created a cause of action for wrongful death.[10] Because the deodand was a revenue-producing practice and largely a remedial concept, any dispute was tried in the Court of the Exchequer, where jurisdiction was premised on an in rem action.[11] Although the concept of deodand did not be-

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[5] D. SMITH, *supra* note 2, ¶ 2.01, at 2-1. Civil forfeiture actions can reach the property of technically innocent individuals who are not being prosecuted, but who have made their property available for criminal purposes. *Id.* ¶ 1.02, at 1-6. Also, in civil forfeiture the government bears a lighter burden of proof, and many of the safeguards of criminal procedure are lacking. *Id.* ¶ 1.02, at 1-5.

[6] *Exodus* 21:28; *see* D. SMITH, *supra* note 2, ¶ 1.02, at 1-6 (civil forfeiture traceable to "goring ox"). *Contra* Maxeiner, *Bane of American Forfeiture Law Banished at Last?*, 62 CORNELL L. REV. 768, 771-77 (1977) (origin in English Navigation Acts).

[7] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974). *But see* Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forefeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 180-81 (1973) ("goring ox" analogous to executed traitor rather than forfeited thing). *See generally* O.W. HOLMES, THE COMMON LAW 7-351 (1973) (tracing principle of forfeiture through Western civilizations).

[8] *Pearson Yacht*, 416 U.S. at 681 n.16.

[9] *Id.* at 682.

[10] 9 & 10 Vict. ch. 62 (1846). This law abolished the institution of the deodands on August 18, 1846. *Id.* The law went hand in hand with "Lord Campbell's Act," which created a cause of action for families of persons killed by accidents. Finkelstein, *supra* note 7, at 170-71 (discussing Lord Campbell's Act, 1846, 9 & 10 Vict. ch. 93).

[11] *Pearson Yacht*, 416 U.S. at 682.

come a part of the common-law jurisdiction of this country,[12] the practice of exercising jurisdiction in rem was adopted by the colonies, and the civil nature of the forfeiture action was thereby created.

Courts have consistently recognized the basic concepts upon which statutory forfeiture laws were established and distinguished the civil nature of the action from the underlying criminal charge. Justice Story articulated the rationale in the case of *The Palmyra*:

> The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum prohibitum, or malum in se . . . the practice has been so this Court understand[s] the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam.[13]

The civil nature of the statutory forfeiture action was later supported by the United States Supreme Court case *Calero-Toledo v. Pearson Yacht*.[14] On the state level, the Supreme Court of the State of Mississippi has also ruled that this state's forfeiture laws, although quasi-criminal in nature, are purely civil actions.[15]

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[12] Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54, 55 (1916). The doctrine had been refined, pared down, and subsequently discarded in England, and it was deemed to be so repugnant to the American idea of justice that it was not included as part of the common law of this country. *Id.*

[13] The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

[14] 416 U.S. 663 (1974); *see infra* text accompanying notes 121-30. In this case, appellee, Pearson Yacht Leasing Co., leased a pleasure yacht to two Puerto Rican residents. *Id.* at 665. The Superintendent of Police seized the yacht after Puerto Rican authorities discovered marijuana on board. *Id.* Although this was a criminal case and it was decided on other issues, the Court bridged the gap between forfeiture and the civil action. *Id.* at 680. At common law the value of an inanimate object directly or indirectly causing the accidental death of another was forfeited. *Id.*

[15] Reed v. State, 460 So. 2d 115, 118 (Miss. 1984). Jack Carlton Reed was an associate of Carlos Lehder, conductor of the largest cocaine smuggling operations by air in the world. *Id.* at 117. Authorities in Mississippi, including the Sheriff of Oktibbeha County and the Mississippi State Bureau of Narcotics, became suspicious of Reed's activities in and around Starkville. *Id.* They obtained a search warrant for a bag Reed had left in Starkville and a lock box in a local bank. *Id.* It was the State's contention that Reed forfeited the contents of both the bag and the lock box because of his intent to use the items in connection with an illegal smuggling operation. *Id.* at 118. Reed was not charged with illegal conduct, and the State sought forfeiture in a civil proceeding. *Id.*

One of the first official recognitions of the potential of forfeiture as a more effective law enforcement technique in the United States came in the area of criminal forfeiture, when Congress made criminal forfeiture a strategic provision within the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970.[16] The Attorney General, in testimony before a Senate Subcommittee on the proposed statute, stated: "While the prosecution of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted."[17]

The Senate Report on the RICO statute had supported the same principle but went further by stressing the effectiveness of civil forfeiture as an additional sanction against the law violator and the economic base of the violator's organization:

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.[18]

Although criminal forfeiture had been somewhat effective, federal law enforcement officials were reluctant to use the criminal forfeiture statutes on a wide scale in combating the rising tide of criminal activity. A report by the General Accounting Office (GAO),[19] prepared at the request of Senator Joseph Biden, clearly demonstrated this reluctance. The report found that "from their enactment in 1970 through March 1980, the RICO and CCE statutes had been used in only ninety-eight narcotics cases. Assets forfeited or subject to forfeiture in those ninety-

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[16] 18 U.S.C. §§ 1961-68 (1970). The provisions for forfeiture within RICO represented an attempt by Congress to revive the little-used procedure of criminal forfeiture. Brickley, *Forefeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 494 (1986).

[17] S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969).

[18] *Id.*

[19] GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE: A SELDOM USED TOOL IN COMBATING DRUG TRAFFICKING (1981).

eight cases amounted to only $2 million."[20] This reluctance came under sharp criticism from Senator Biden. Some authorities believe that this report and the subsequent criticism were a "strong impetus for change,"[21] which resulted in an increased interest, not only in criminal forfeiture statutes, but also in the enactment of statutes based on the same principles of economic sanction but operating through civil in rem procedures.

Since 1970, law enforcement officials on the federal, state and local levels have shifted their enforcement strategies to accommodate the philosophy of economic sanction through civil forfeiture. The judiciary has recognized this trend, and some courts have adopted this shift. In *Eggleston v. Colorado*,[22] the court took notice of the change in strategy:

> In the last few years a discernible shift in the methodology of law enforcement has taken place. Federal, state and local agencies have placed a new emphasis on depriving criminal activity of its largesse. The means used include forfeiture, levy, revocation of licenses, declaration of public nuisances and civil proceedings for injunctions and recoupment. Some of these means have existed for a considerable time; others are innovative.[23]

The two major civil forfeiture statutes which set the pace for the move toward in rem forfeiture proceedings became law in 1978. Enacted on the federal level, the statutes were directed against the conveyances used to smuggle aliens[24] and drug profits.[25] Unlike the previous criminal forfeiture statutes, the civil forfeiture provisions were used extensively in federal law enforcement. According to reports, "the INS issued implementing regulations effective May 1979, and began seizing conveyances

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[20] D. SMITH, *supra* note 2, ¶ 1.02, at 1-16 n.25.

[21] *Id.* ¶ 1.02 at 1-16.

[22] 636 F. Supp. 1312 (D. Colo. 1986), *rev'd*, 873 F.2d 242 (10th Cir. 1989), *cert. denied on other grounds*, 110 S. Ct. 1112 (1990).

[23] *Eggleston*, 636 F. Supp. at 1315. Police had seized 12 one-ounce gold bars and approximately $1.5 million plus accrued interest from claimant's home. *Id.* The issue before the court was the priority of claims by different law enforcement agencies to the same assets seized as a result of this war on crime. *Id.*

[24] 8 U.S.C. § 1324 (1978). This statute provides for the seizure and forfeiture of any conveyance, including any vessel, vehicle, or aircraft which has been or is being used to bring or attempt to bring an alien into the United States. *Id.*

[25] 21 U.S.C. § 881(a)(6) (1978).

thereafter . . . in 1979 INS had seized only 193 conveyances. By fiscal year 1981, INS seized 2,831 conveyances. In 1982, INS seized 4,277 conveyances."[26] The same source indicated an increase in DEA seizures as well: "The Drug Enforcement Administration claimed a six-fold increase in total seizures and a twenty-fold increase in forfeitures between calendar year 1979 and fiscal year 1980."[27]

The increased use of civil forfeiture laws on the federal level generated a corresponding interest in state law enforcement officials. There was likewise an increased emphasis on drug law enforcement efforts. The forfeiture sanction was viewed as a potential tool against the drug abuser.

The forfeiture laws in the State of Mississippi are all statutorily created, as there are no common-law forfeiture provisions. Although Mississippi has enacted several forfeiture statutes in the past,[28] the civil forfeiture provisions of the Mississippi Controlled Uniform Substances Law more precisely track the federal experience in asset seizure and forfeiture. This is due primarily to the legislature's having modeled our statutes on controlled substances after the Uniform Controlled Substances Act. The federal comprehensive Drug Abuse Prevention and Control Act of 1970,[29] more popularly known as the "Controlled Substances Act," also served and continues to act as a guide for legislation within Mississippi's Uniform Controlled Substances Law.[30]

Mississippi's Uniform Controlled Substances Law was statutorily created in 1971;[31] and although the act contained civil forfeiture provisions, they were not widely used. The watershed

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[26] D. SMITH, *supra* note 2, ¶ 1.02, at 1-17 n.28.

[27] *Id.* Title to the seized property vests in the government upon commission of the unlawful act which gave rise to the forfeiture. 21 U.S.C. § 881(h) (Supp. 1990); *see* Eggleston v. Colorado, 873 F.2d 242, 247 (10th Cir. 1989) (relation back of forfeiture judgment to time of unlawful act); *see also* United States v. Trotter, 889 F.2d 153, 157 (8th Cir. 1989) (purpose of codified relation-back rule is to defeat transfers by defendants).

[28] *See, e.g.*, MISS CODE ANN. § 67-1-17 (Supp. 1989) (Alcoholic Beverages Forfeiture Provision); MISS. CODE ANN. § 75-29-15 (1972) (Adulterated Food or Drug Forfeiture Provision); MISS. CODE ANN. § 97-33-17 (Supp. 1989) (Gambling Statute Forfeiture Provision); MISS. CODE ANN. § 97-37-3 (Supp. 1989) (weapons used in crime forfeitable).

[29] P.L. 91-513, title II, § 511, 84 Stat. 1276 (1970) (codified at 21 U.S.C. § 881).

[30] MISS. CODE ANN. §§ 41-29-101 to -185 (1972 & Supp. 1989).

[31] MISS. CODE ANN. § 4-29-101 (1972).

years for civil forfeiture in the State of Mississippi were the 1980's. Largely because of the enactment of several pieces of key legislation dealing with the drug forfeiture provisions, the number of seizures and forfeiture of assets has grown steadily since 1981. The latest forfeiture provision added to the Mississippi Uniform Controlled Substances Law became law in July, 1988. The Administrative Forfeiture Statue, enacted in 1988,[32] allows for the non-judicial forfeiture of property if the value is less than five thousand dollars and the claimant does not request judicial review.[33] The specific procedures which must be followed in the State of Mississippi are discussed below in Part III.

In summary, the forfeiture statutes associated with the Controlled Substances Law are designed to support the criminal statutes by providing a one-two punch against the drug law violator. The forfeiture of the tainted asset prevents the enjoyment and use of the illicit gains, and it serves to hold the user accountable.

This new economic principle of drug law enforcement recognizes that we have heretofore focused criminal sanctions on the individual participant and not the social or economic structure of the drug network. As a result, drug entrepreneurs have kept billions of dollars in drug profits; the drug network has operated untouched; drug trafficking has increased; and the social cost of drug use has increased in all classes of society. Forfeiture is designed to reach profit-motivated crimes and drive away the contributors of assets by redirecting their assets to legitimate use. The goal should be to ensure sufficient sanctions against the drug kingpin and continue the punishment of the low-level dealer. However, the sanction against the kingpin must ensure both punishment for the individual kingpin and effective sanctions sufficient to destroy the kingpin's economic kingdom.

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[32] MISS. CODE ANN. § 41-29-176 (Supp. 1989). The nature of the property must be other than that of a controlled substance, raw material or paraphernalia; and the attorney for the seizing law enforcement agency must provide notice of his intention to forfeit the seized property. *Id.*

[33] *Id.*

II. Forfeiture Provisions Under the Mississippi Controlled Substances Act

Statutory authority allows state and local law enforcement officers to seize and forfeit real and personal property involved in the violation of the Controlled Substances Law.[34] The forfeiture provisions under the act, even though quasi-criminal, are wholly civil in nature and require only a preponderance of evidence to prove guilt.[35] Therefore, the state is not required to prove beyond a reasonable doubt that the claimant or owner of the property was involved in any illegal activity.[36]

According to the statute, not only are the controlled substances themselves subject to forfeiture if they have been illegally manufactured, dispensed, or acquired;[37] also subject to forfeiture are raw materials and equipment,[38] containers,[39] and conveyances,[40] and, of course, drug paraphernalia.[41] The reach of the statute further extends to "[a]ll money, deadly weapons, books, records, and research products and materials, including formulas, microfilm, tapes and data which are used, or intended

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[34] The specific statutes that deal with forfeiture are Miss. Code Ann. §§ 41-29-153, -176, -177, -179, -181, -183, -185 (1972).

[35] Miss Code Ann. § 41-29-179 (Supp. 1989); *see* United States v. Three Hundred Sixty-Four Thousand Nine Hundred Sixty Dollars in U.S. Currency, 661 F.2d 319, 324 (5th Cir. 1981) (evidence sufficient to shift burden to claimants in forfeiture proceeding is reasonable ground for belief); Reed v. State, 460 So. 2d 115, 118 (Miss. 1984) (state must prove by preponderance of evidence that articles to be forfeited violated statute); Ervin v. State, 434 So. 2d 1324, 1326 (Miss. 1983) (same).

[36] Reed v. State, 460 So. 2d 115, 118 (Miss. 1984). "In order to sustain forfeiture, all the state need prove is that the seized items were possessed by Mr. Reed with the intent to be used in connection with an illegal smuggling conspiracy." *Id.*; *see supra* note 5.

[37] Miss. Code Ann. § 41-29-153(a)(1) (Supp. 1989).

[38] The statute provides for forfeiture of "all raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance." Miss. Code Ann. § 41-29-153(a)(2) (Supp. 1989).

[39] "All property which is used, or intended for use, as a container" for illegal drugs, or the "raw materials, products, and equipment" listed in subsection (a)(2) may also be forfeited. Miss. Code Ann. § 41-29-153(a)(3) (Supp. 1989).

[40] Law enforcement officials may seize "[a]ll conveyances, including aircraft, vehicles or vessels, which are used or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of [controlled substances or the raw materials, products, and equipment listed in subsection (a)(2)]." Miss. Code Ann. § 41-29-153(a)(4) (Supp. 1989).

[41] Miss. Code Ann. § 41-29-153(a)(6) (Supp. 1989).

for use, in violation of [the act]."[42] Finally, the statute sweeps the assets of the drug dealer within its grasp with a broad provision for forfeiture of "[e]verything of value, including real estate, furnished, or intended to be furnished, in exchange for a controlled substance in violation of [the statute], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, businesses or business investments, securities, and other things of value used, or intended to be used, to facilitate any violation of [the statute]."[43] When money is found in close proximity to controlled substances or to forfeitable records of importation, manufacture or distribution of controlled substances, it is presumed to be forfeitable; and the statute shifts the burden of going forth with the proof to the claimant of the property.[44]

Certain exceptions to the forfeiture requirement have been statutorily prescribed.[45] A conveyance is not subject to forfeiture under the statute if it is being used as a legitimate common carrier and without knowing complicity by a violator of the Controlled Substances Law,[46] or if the owner of the conveyance did not consent to the use of the conveyance and had no knowledge that it was being used to violate the statute.[47] There is also an exception for a conveyance which is encumbered by a bona fide security interest where the secured party has had no knowledge of and given no consent to the illegal activity.[48] Also, if the conveyance is used to transport a kilogram or less of marijuana, it cannot be forfeited.[49] There is a further exception for the "innocent owner" of those items subject to forfeiture under section 41-29-153(a)(7) of the Mississippi Code[50] when the owner of the

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[42] MISS. CODE ANN. § 41-29-153(a)(5) (Supp. 1989).

[43] MISS. CODE ANN. § 41-29-153(a)(7) (Supp. 1989).

[44] *Id.*

[45] MISS. CODE ANN. § 41-29-153(a)(4)(A)-(D) (Supp. 1989); *see also id.* § 41-29-153(a)(7)(A)-(B) (exceptions to the forfeiture requirement).

[46] MISS. CODE ANN. § 41-29-153(a)(4)(A) (Supp. 1989).

[47] MISS. CODE ANN. § 41-29-153(a)(4)(B) (Supp. 1989); *see* Saik v. State, 473 So. 2d 188, 191 (Miss. 1985); Ervin v. State, 434 So. 2d 1324, 1325 (Miss. 1983).

[48] MISS. CODE ANN. § 41-29-153(a)(4)(C) (Supp. 1989).

[49] MISS. CODE ANN. § 41-29-153(a)(4)(D) (Supp. 1989). This limitation does not apply to seizures of cash. *See* 106 The Sun Herald, Dec. 4, 1989, at A4, col. 4 (defense lawyers protesting seizure of cash for misdemeanor drug possession).

[50] MISS. CODE ANN. § 41-29-153(a)(7)(A)-(B) (Supp. 1989).

property had no knowledge of and gave no consent to the illegal use of the property.[51] Similarly, there is an exception under the broad provisions of section 41-29-153(a)(7) of the Mississippi Code if the property subject to forfeiture is encumbered by a bona fide security interest and the secured party had no knowledge of and gave no consent to the actions that placed the secured property in jeopardy.[52]

The provisions of the civil forfeiture statutes also control the procedure for seizing items of personal property. Property subject to forfeiture may be seized pursuant to statute by state and local law enforcement officers or the State Board of Pharmacy upon process issued by any appropriate court with jurisdiction over the property.[53] The property can also be lawfully seized without process if such seizure is incident to an arrest, a search under a search warrant, or an inspection under an administrative inspection warrant.[54] Process may likewise be unnecessary if the property is the subject of a prior judgment,[55] if the seizing officers have probable cause to believe that the property presents a danger to health or safety,[56] or if the seizing officers have probable cause to believe that the property was used or intended to be used in violation of the Mississippi Uniform Controlled Substances Law.[57] In addition, all illegally held controlled substances and plants are considered contraband and can be seized and summarily forfeited to the state.[58]

Once the property has been seized, the state or local agency retains custody until final legal disposition has occurred, and, according to section 41-29-183, "no court has jurisdiction to interfere therewith by replevin, injunction, supersedeas or in any other manner."[59] Furthermore, the forfeiture procedures pre-

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[51] *Id.* § 41-29-153(a)(7)(A) (Supp. 1989).

[52] *Id.* § 41-29-153(a)(7)(B) (Supp. 1989).

[53] MISS. CODE ANN. § 41-29-153(b)(1)-(4) (Supp. 1989).

[54] MISS. CODE ANN. § 41-29-153(b)(1) (Supp. 1989).

[55] MISS. CODE ANN. § 41-29-153(b)(2) (Supp. 1989).

[56] MISS. CODE ANN. § 41-29-153(b)(3) (Supp. 1989).

[57] MISS. CODE ANN. § 41-29-153(b)(4) (Supp. 1989).

[58] MISS. CODE ANN. § 41-29-153(C)-(D) (Supp. 1989). Both of these subsections confer authority upon the state to seize contraband and controlled substances irrespective of whether the owners of the illegal items are known or unknown. *Id.*

[59] MISS. CODE ANN. § 41-29-183 (1972).

scribed in sections 41-29-177 through -181 are the sole remedy available to the claimant.[60]

The civil forfeiture proceedings set out in the Mississippi Code, beginning with section 41-29-177,[61] initiate when the state or local officials file a petition for forfeiture in a court of the county where the property was seized, where the prosecution for the underlying criminal case is brought, or where the owner of the property can be found.[62] The petition may be filed in the circuit court or the county court, if the county court has jurisdiction over the property.[63] Although no specific time frame is required, the statute does state that the petition must be "promptly" filed.[64] The only interpretation the Mississippi Supreme Court has given on the promptness requirement was in *Lewis v. State*.[65] In *Lewis* the court found that filing eighteen months after the criminal case was concluded, without explanation for the delay, was an impermissibly excessive delay.[66]

The statute further requires that notice be provided to all interested parties, including the owner, any secured party or bonafide lienholder of whom the seizing agency has actual knowledge, and any holder of a mortgage, deed of trust, lien or encumbrance of record if the property is real estate.[67] Notice must also be provided to any person in possession of property subject to forfeiture at the time that the property is seized. With particular kinds of property, such as motor vehicles titled within the state, those titled outside the state, and items susceptible to financing statements, the statute requires that specific steps be taken to ascertain the identity of any interested parties.[68] The statute also requires certain good faith efforts by the seizing agency

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[60] *Id.*

[61] MISS. CODE ANN. §§ 41-29-177 to -185 (Supp. 1989).

[62] *Id.* § 41-29-177(2) (Supp. 1989).

[63] *Id.*

[64] *Id.*

[65] 481 So. 2d 842 (Miss. 1985).

[66] *Lewis*, 481 So. 2d at 844. The court held that the lower court erred in ordering a forfeiture of $1,320, which had been seized during two separate searches of the appellant's apartment. *Id.* In both instances, the cash was found in close proximity to marijuana finds. *Id.* at 842-43.

[67] MISS. CODE ANN. § 41-29-177(2)(a)-(e) (Supp. 1989).

[68] *Id.*

when the property seized is an aircraft, real estate, or personal property if there is any cause to believe that a security interest exists in the property.[69] Additionally, if no identified owners or interested party comes forth, the statute prescribes procedures for publishing to the "unknown owner" with a detailed description of the property subject to forfeiture.[70] The notice provisions of the statute are clear, and strict adherence to the appropriate procedures is required.[71]

The procedures for disposition of seized property and the requirements for the answer and hearing are also outlined within the statutory forfeiture provisions of the Mississippi Controlled Substances Law.[72] The statute provides that once service of process is complete, the claimant has thirty days within which to answer the petition for forfeiture.[73] If an answer is not filed, the court is required to hear evidence that the property is subject to forfeiture and then to forfeit the property to the appropriate seizing agency.[74] The requirement that the court "hear" evidence when no answer is filed may necessitate an actual recitation in the record and may therefore preclude a default judgment based solely on the default procedures outlined in the Mississippi Rules of Civil Procedure.[75] If an answer is filed, the statute requires that a hearing on the forfeiture be set within thirty days after filing the answer.[76] The statute is silent as to which party is responsible for pursuing the hearing date and whether or not the thirty-day requirement acts as a de facto statute of limitations.[77] However, Mississippi law makes it clear that the burden of prosecuting a civil cause of action is on the

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[69] MISS. CODE ANN. § 41-29-177(6),(8) (Supp. 1989).

[70] MISS. CODE ANN. § 41-29-177(10) (Supp. 1989). This service by publication procedure must also meet the other requisites of notice by publication of attachments. *Id.*

[71] MISS. CODE ANN. § 41-29-177(11) (Supp. 1989). "No proceedings instituted pursuant to the provisions of this article shall proceed to hearing unless the judge conducting the hearing is satisfied that this section has been complied with." *Id.*

[72] *Id.* § 41-29-179 (Supp. 1989).

[73] *Id.* § 41-29-179(1) (Supp. 1989).

[74] *Id.*

[75] *See* MISS. R. CIV. P. 55 (allows automatic default judgment against absent party).

[76] MISS. CODE ANN. § 41-29-179(1) (Supp. 1989).

[77] *See id.*

petitioner.[78] Furthermore, forfeiture laws in Mississippi are considered highly penal in nature and should be strictly construed against the state.[79] Either the state or the owner of the property may request a continuance to postpone the forfeiture hearing "to a date past the time any criminal action is pending against the owner."[80] The statute is silent as to whether a forfeiture hearing can be postponed for more than thirty days and still be heard before the criminal hearing.[81] It would appear that the statute does not require such an all-or-nothing standard, and where it is silent on these issues, public policy would dictate that the court and the Mississippi Rules of Civil Procedure control. The statute's intent, however, is clear. Where the owner is not the subject of a pending criminal charge or hearing, a postponement under this section would be inappropriate.[82] The thirty-day requirement thereby acts as a de facto statute of limitations.[83] If an answer has been filed, the burden of proof is on the petitioner; however, "if an answer has not been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture."[84]

At the hearing, any claimant to an interest in the property may prove interest as long as it was created without knowledge or consent that the property was to be used in a manner resulting in forfeiture.[85] This provision acts as automatic standing for

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[78] MISS. CODE ANN. § 41-129-179(2) (Supp. 1989).

[79] *See* Ervin v. State, 434 So. 2d 1324, 1326 (Miss. 1983) (forfeitures are penal and are to be "strictly construed"); Stringer v. State, 229 Miss. 412, 423, 91 So. 2d 263, 268 (1956) (same); Zambroni v. State, 217 Miss. 418, 423, 64 So. 2d 335, 336 (1953) (forfeitures are disfavored); Williams v. General Insurers, Inc., 193 Miss. 276, 292, 7 So. 2d 876, 878 (1942) (same).

[80] MISS. CODE ANN. § 41-29-179(1) (Supp. 1989).

[81] *See id.*

[82] For an analogous discussion which examines the rights of innocent property owners whose property has been seized by government narcotics officials, see Strafer, *Civil Forfeitures: Protecting the Innocent Owner*, 37 U. FLA. L. REV. 841-60 (1985).

[83] In view of the penal nature of the statute and the case law strictly construing forfeitures in Mississippi, it is a logical conclusion that any deviation from the strict requirements of the statute, without ample justification, would dictate the dismissal of the forfeiture proceeding.

[84] MISS. CODE ANN. § 41-29-179(2) (Supp. 1989).

[85] MISS. CODE ANN. § 41-29-179(3) (Supp. 1989).

legitimate claimants. However, it does clearly preclude any standing for claims which are fraudulent or where claimants are knowing participants in the underlying violation that caused the property to be subject to forfeiture.[86] Once standing is established, the claimant may put on proof at the hearing that he is a bona fide lienholder, secured party, or other person holding a secured interest.[87] Furthermore, if the interest is greater than or equal to the value of the property, the court must release the property to the claimant regardless of the forfeitable status.[88] However, if the property is subject to forfeiture and the claimant's security interest is less than the value of the property, then the court must order the property forfeited to the seizing agency.[89]

The final disposition of items seized and forfeited is also controlled by statute.[90] In the case of drugs, raw materials, or drug paraphernalia, the circuit court must direct the State Bureau of Narcotics to destroy the property if it has no legal use, release it to a "person authorized by the court to receive it,"

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[86] *Id.* One active area of litigation has focused on the degree of ownership, right, title, or interest necessary to confer standing on a party challenging the forfeiture proceedings. *See, e.g.*, United States v. $47,875.00 in United States Currency, 746 F.2d 291, 293-94 (5th Cir. 1984) (one who lends money has insufficient legal or equitable interest in cash loaned to contest its forfeiture); United States v. 1982 Sanger 24' Spectra Boat, 738 F.2d 1043, 1046 (9th Cir. 1984) (claimant need not allege ownership; lessor property interest such as possessions confers standing); United States v. $3,799.00 in United States Currency, 684 F.2d 674, 678 (10th Cir. 1982) (standing lacking where seized money merely represented gambling debt owed to claimant); United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars ($364,960.00) in United States Currency, 661 F.2d 319, 326-28 (5th Cir. 1981) (where party challenging forfeiture is assignee not in possession, claimant must prove validity of assignment and assignor's valid ownership at time of assignment); United States v. One 1945 Douglas C-54 (DC-4) Aircraft, 647 F.2d 864, 866 (8th Cir. 1981) (significant ownership interest may be evidenced by actual possession, title, control or financial stake; however, key inquiry centers on who exercised dominion and control); United States v. One 1981 Datsun 280ZX, 563 F. Supp. 470, 474-76 (E.D. Pa. 1983) (court determined which party actually suffered from Datsun's forfeiture).

[87] Miss. Code Ann. § 41-29-179(4) (Supp. 1989).

[88] *Id.*

[89] *Id.* It is the policy of the Mississippi Bureau of Narcotics to protect the interest of the innocent secured party regardless of the status of the forfeiture proceeding. All legitimate interests of innocent secured parties have consistently been protected and payments made to the extent of the security.

[90] Miss. Code Ann. § 41-29-181 (Supp. 1989).

retain it for official use, or deliver it to "a government agency or department for official purposes."[91] All other property, whether real or personal, is to be sold for cash to the highest bidder at public auction.[92] The auctions for personal property must be advertised weekly for at least three weeks prior to the auction, and such advertisement must be in a newspaper of general circulation in the jurisdiction.[93]

The proceeds of the sale are first used to purchase the interests of any secured party and to cover the costs of the forfeiture proceedings.[94] The remainder is divided between the seizing agency and the state treasurer if only one agency was involved; however, if two or more agencies were involved in the seizure, then the first fifty percent goes to the initiating agency and the remaining fifty percent is divided equitably among the other agencies involved.[95] The particular language of the statute controlling the distribution of forfeited funds clearly indicates that the proceeds from forfeited assets not deposited in the general fund should accrue to the benefit of the seizing law enforcement agency. This fact is indicated first by the language in the statute that "the proceeds shall be deposited and credited to the budget of the participating law enforcement agency"[96] and by the clear language and intent of section 41-29-185. The purpose of section 41-29-185 is to facilitate the state acquisition of assets seized in cooperation with federal authorities. Its language is even more pronounced than that in section 41-29-181.[97] Specifically the statute requires that any federally shared assets be "used to augment existing state and local law enforcement budgets and not to supplant them."[98] If both statutes are read together, it is clear

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[91] MISS. CODE ANN. § 41-29-181(1)(a)-(d) (Supp. 1989).

[92] MISS. CODE ANN. § 41-29-181(5)-(6) (Supp. 1989).

[93] MISS. CODE ANN. § 41-29-181(6) (Supp. 1989).

[94] *Id.*

[95] MISS. CODE ANN. § 41-29-181(2)(a)(b) (Supp. 1989). If the participating law enforcement agencies cannot agree on an equitable distribution of their 50%, then the court is authorized to determine the distribution. *Id.* § 41-29-181(2)(b).

[96] MISS. CODE ANN. § 41-29-181(2)(a)(b) (Supp. 1989).

[97] It is the author's understanding that without this statute the federal authorities would be reluctant to share any federally forfeited assets because the benefits of the assets might not accrue to the local state law enforcement agency assisting in the seizure.

[98] MISS. CODE ANN. § 41-29-185 (Supp. 1989).

that the legislature intended to turn the ill-gotten gains of the drug traffickers against them by augmenting law enforcement efforts.

In 1988, a newly enacted law changed the complexion of civil forfeiture law in the State of Mississippi. Relying on federal precedent, Mississippi enacted its first administrative forfeiture statute.[99] Administrative forfeiture is a non-judicial forfeiture of assets seized by the government. This practice has been in effect on the federal level since 1844.[100] The administrative forfeiture was designed to act as a "summary forfeiture," or one in which property of insignificant value was forfeited without benefit of judicial determination.[101]

The status of the administrative forfeiture has evolved dramatically since 1844. Congress has greatly increased the efficiency of the administrative forfeiture by allowing the government to avoid the time-consuming and costly necessity of obtaining default judgments in uncontested forfeiture cases. The most dramatic expansion of federal administrative forfeiture laws occurred with the enactment of the Comprehensive Crime Control Act of 1984.[102] The law permits administrative forfeiture of "any conveyance or merchandise whose value does not exceed $100,000 dollars; merchandise the importation of which is prohibited, regardless of the value; and conveyances used to import, export or otherwise transport or store any controlled substance, regardless of the value of the conveyance."[103]

The success of the federal administrative forfeiture statutes and their obvious cost-effective results have now caught the interest of many states' legislatures. A discussion of the specific similarities and differences between the State of Mississippi administrative forfeiture law and the federal counterpart is beyond the scope of this article; however, some important distinctions

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[99] MISS. CODE ANN. § 41-29-176 (Supp. 1989).

[100] Act of April 2, 1844, ch. 8, 5 Stat. 653.

[101] *See* United States v. United States Currency in Amount of $2,857.00, 754 F.2d 208, 211-13 (7th Cir. 1985) (summarizing difference between administrative and judicial forfeiture procedures and their relationship to each other).

[102] 19 U.S.C. §§ 1607, 1610 (1988). Customs forfeiture laws are incorporated by reference by most federal civil forfeiture statutes. *See, e.g.*, 21 U.S.C. § 881(d) (1988).

[103] 19 U.S.C. §§ 1607, 1610 (1988).

should be addressed. First, the most apparent distinction is the amount of the value of property contemplated by the state statute. Under Mississippi law, property falls under the jurisdiction of the administrative forfeiture statute only if "value . . . does not exceed Five Thousand Dollars . . . ."[104] Clearly, the state legislature intended to narrow the category of property subject to non-judicial forfeiture.

The Mississippi statute is also very clear in its requirement that an attorney file the notice and oversee the proceeding through the entire process.[105] "The attorney for the seizing law enforcement agency shall provide notice of intention to forfeit," and request for judicial review must be filed with "the attorney for the seizing . . . agency," and "the attorney shall prepare a written declaration of forfeiture."[106] The requirement for an attorney to be actively involved in the administrative forfeiture proceedings in the Mississippi statute is, in all likelihood, the result of legislature's attempt to insure the claimant's due process rights by requiring oversight of the process by an individual trained to recognize the rights of the claimant and the constitutional duties imposed upon the government.

Another significant difference between the federal statute and the Mississippi administrative forfeiture statute is the requirement under the federal statute that a bond be posted if a judicial forfeiture is requested by the claimant.[107] The Mississippi statute requires only "a request for judicial review." No bond is required and no provision exists for payment of costs of the unsuccessful claimant under the Mississippi statute.[108] This section insures the claimant an avenue for judicial review without cost or penalty for invoking the right of judicial review. The distinctions between the federal administrative forfeiture provi-

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[104] MISS. CODE ANN. § 41-29-176 (Supp. 1989).

[105] MISS. CODE ANN. § 41-29-176(2) (Supp. 1989).

[106] MISS. CODE ANN. §§ 41-29-176(2),(5)-(7) (Supp. 1989).

[107] 19 U.S.C. § 1608 (1988). This statute requires, for filing a claim for judicial review, a bond of $5,000, or 10% of the value of the property, whichever is less; and this must be posted with the seizing officer, who must then forward the sum to the U.S. Attorney for filing of the forfeiture action. *Id.* The bond becomes subject to the costs of litigation if the claimant is unsuccessful in the judicial hearing. *Id.*

[108] MISS. CODE ANN. § 41-29-176(5) (Supp. 1989).

sions and our state statute seem to indicate the state legislature's intent to curb the potential for abuse, while at the same time promoting an efficient and fair method of administrative forfeiture.

III. Procedures for Filing an Administrative Forfeiture

A. Introduction

Section 41-29-176 of the Mississippi administrative forfeiture statute is very specific in the procedural requirements necessary to effectuate a valid administrative forfeiture.[109] The two primary documents used by the Mississippi Bureau of Narcotics in following the requirements of the statute are the "Notice of Intention To Forfeit Seized Property" (Form I)[110] and the "Declaration of Forfeiture" (Form II).[111] A third form, the "Notice of Declaration of Forefeiture" (Form III),[112] is not required by statute, however; it is included in the suggested administrative forfeiture guideline simply to insure notification to the claimant that his property has been forfeited to the seizing agency.

B. Step One

Before any administrative forfeiture can be initiated, the statute requires that the property to be forfeited have a value not to exceed five thousand dollars.[113] The statute offers no instruction on the methods to calculate value. Obviously, if cash is seized, the value is readily apparent; but in the case of automobiles or other property, the value may not be as clear. The statute does allow the seizing agency to approximate value, but this approximation must be based on a logical standard. Therefore, in the case of automobiles, the writer recommends

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[109] The forms included in the appendix to this article are designed to be self-explanatory. The attorney for the seizing agency needs only to re-type the formatted document, inserting the pertinent data where it is necessary. The forms are best suited for inclusion on a word processing system. This allows for the input of case-specific data and eliminates the necessity of re-typing the boilerplate requirements of the statute.

[110] Appendix.

[111] Appendix.

[112] Appendix.

[113] Miss. Code Ann. § 41-29-176(1) (Supp. 1989).

that the vehicle's value be approximated by a system which will offer a reliable and valid means of assessment: the black book system. These black books are used by car dealers to set a standard value for used cars. The valuation of other property should also be accomplished by a method which clearly supports the value of a logical and rational standard.

Once the value has been assessed and it is clear the property fits the statutory requirements, then the seizing agency should contact its attorney to prepare and transmit the "Notice of Intention To Forefeit Seized Property." When the Notice form has been completed and all necessary information has been placed within the appropriate provisions, then the statute requires that notice be mailed by certified mail with a return receipt requested.[114] The form notification must be mailed to all interested parties required to be notified by statute.[115] Any interested party may obtain judicial review by submitting a written request to the attorney giving notification.[116] The claimant has thirty days from the receipt of the notification in which to request review.[117] The thirty-day period does not begin to run until the claimant receives actual notification. Accordingly, it is suggested that the letter be sent by certified mail with "restricted delivery" to the actual party in interest. If the letter is returned undeliverable or is refused, the statute allows alternative service by publication.[118]

The remainder of this first step is limited to the form "Notice of Intention To Forfeit Seized Property," which is identified further as "Administrative Forfeiture Guideline Form I." Little analysis for Form I is necessary because the form is designed to be self-explanatory. However, there are specific statutory requirements which must be included in any Notice To Forfeit. These required statutory provisions can be keyed to the various segments of Form I by alphabetical letters A-J. An enforcing official can carry out step-by-step procedures for the forfeiture

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[114] MISS. CODE ANN. § 41-29-176(2) (Supp. 1989).
[115] MISS. CODE ANN. § 41-29-177(2) (Supp. 1989).
[116] MISS. CODE ANN. § 41-29-176(4) (Supp. 1989).
[117] MISS. CODE ANN. § 41-29-176(5) (Supp. 1989).
[118] MISS. CODE ANN. § 41-29-176(3) (Supp. 1989).

statute by following this outline.[119]

C. *Step Two: Administrative Forfeiture Guideline Form II — Declaration of Forfeiture*

If the first step has been fully complied with and the per-

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[119] STEP I *A*. The administrative forfeiture statute requires that the notice of the intent to forfeit be given to "all persons who are required to be notified pursuant to section 41-29-177(2), Mississippi Code of 1972." MISS. CODE ANN. § 41-29-176(2) (Supp. 1989). Thus notice must be provided to (1) the owner of the property, (2) any lienholder or secured party, and (3) any person in possession at time of seizure. For this required notification, a separate Form I should be sent to each party specified by statute. The name of the person notified should be placed in provision *A* of Form I.

STEP I *B*. Provision *B* is designed to satisfy the statutory requirement of notice and specifically to comply with section 41-29-176 (4)(c) requiring the notice to provide date and place of seizure.

STEP I *C*. Provision *C* is designed to satisfy the statutory requirement in section 41-29-176 (4)(a) of description of property. The property should be described in such a manner as to indicate clearly the exact property seized.

STEP I *D*. Provision *D* is designed to satisfy the statutory requirement of section 41-29-176(4)(b); approximate value of property must be based on some logical standard.

STEP I *E*. Provision *E* is designed to satisfy the statutory requirement of section 41-29-176(4)(d), requiring that the connection between the property and the violation of the Uniform Controlled Substances Law be specifically articulated. Attachment A to Form I was created to assist in this requirement. Attachment A provides a form explanation which can be used to describe the connection between property and violation of the statute. Attachment A contains seven form paragraphs which are specific as to the type of seizure and the category of property seized. The form paragraphs are designed to allow their placement in STEP I *E* with no deletion or addition except where required by the form within the paragraph.

STEP I *F*. Provision *F* is designed to satisfy the statutory and constitutional requirements of notice.

STEP I *G*. Provision *G* is designed to satisfy the statutory requirement of section 41-29-176(4)(f), which calls for including "a statement that the property will be forfeited to the seizing law enforcement agency if a request for judicial review is not timely filed." MISS. CODE ANN. § 41-29-176(4)(f) (Supp. 1989).

STEP I *H*. Provision *H* is designed to satisfy the specific statutory requirement of section 41-29-176(4)(e), which requires including in the notice instructions on how to request judicial review.

STEP I *I*. Provision *I* is designed to supplement provision *H* and is further included to satisfy constitutional notice requirements. The statute requires that a forfeiture petition be filed when a claimant requests judicial review. MISS. CODE ANN. § 41-29-176(7) (Supp. 1989).

STEP I *J*. Provision *J* is designed to satisfy the statutory requirement of section 41-29-176(2): "The attorney for the seizing law enforcement agency *shall* provide notice of intention to forfeit the seized property administratively." MISS. CODE ANN. § 41-29-176(2) (Supp. 1989) (emphasis added).

sons notified have not requested judicial review within thirty days, the statute requires "the attorney for the seizing law enforcement agency [to] prepare a written declaration of forfeiture of the subject property . . . ."[120] Form II has been designed to satisfy this requirement. The declaration of forfeiture is not required to be sent to the claimant; it can be used to verify the forfeiture of property, and in the case of a vehicle forfeiture, should be sufficient documentation for title transfer.

D. Step Three: Administrative Forfeiture Guideline Form III — Notice of Declaration of Forfeiture

The notice of declaration of forfeiture is not required by statute. However, it is strongly suggested that the notice be sent. This will allow for final notice of forfeiture to the claimant and may thus mitigate constitutional challenges. Since the form is not statutorily required, the notice may be signed by the chief executive of the seizing law enforcement agency, and it is not necessary that the notice be sent by certified mail.

IV. Common Legal Issues Raised by Civil Forfeiture Statutes

The first issue usually raised when state civil forfeiture statutes are applied is whether the civil forfeiture laws are constitutional. This question was answered in the affirmative by the United States Supreme Court in the landmark forfeiture case *Calero-Toledo v. Pearson Yacht Leasing Co.*[121] The *Pearson Yacht* case has become the benchmark for civil forfeiture jurisprudence throughout the United States. A brief summary of the facts in *Pearson Yacht* follows:

A Puerto Rico statute provided for forfeiture to the commonwealth of all vessels used to transport controlled substances, including marijuana.[122] The defendant superintendent of police

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[120] Miss. Code Ann. § 41-29-176(6) (Supp. 1989).

[121] 416 U.S. 663 (1974).

[122] *Pearson Yacht*, 416 U.S. at 665 (citing P.R. Laws Ann. tit. 24, § 2512(a)(4),(b) (1973)). This statute provided for forfeiture of all aircraft, vehicles, or vessels used to facilitate the sale, receipt, possession, or transportation of controlled substances, regardless of intent. P.R. Laws Ann. tit 24, § 2512 (a)(4).

seized a yacht leased from the plaintiff by two Puerto Rican residents and charged one of the lessees with violation of the Puerto Rican Controlled Substances Act.[123] The facts revealed that the leasing company was an innocent owner but was negligent in leasing its vessel to the Puerto Rican defendants.[124] The plaintiff leasing company sought a declaration that the application of the statutes denied it due process of law insofar as the statutes authorized the officials to seize the yacht without notice or just compensation.[125] A three-judge district court agreed with the leasing company;[126] but on direct appeal, the United States Supreme Court reversed.[127] In an opinion by Justice Brennan, expressing the view of eight members of the court, the Court held:

> First, seizure under the Puerto Rican statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized . . . will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally . . . seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes.[128]

Pearson Yacht validated the concept of civil forfeiture on the state level, at least in cases where the owner was both innocent and negligent, as opposed to being both innocent and non-negligent.[129] The ruling led to a proliferation of innocent-owner statutes, with the result that forty-eight out of the fifty states have developed some statutory exception from forfeiture for owners of property with no knowledge or consent of the underly-

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[123] *Pearson Yacht*, 416 U.S. at 665.
[124] *Id.* at 668, 690.
[125] *Id.*
[126] *Id.* at 669.
[127] *Id.*
[128] *Id.* at 679 (footnotes omitted).
[129] *Id.* at 689-90.

ing criminal charge.[130]

The *Pearson Yacht* decision has for the most part settled the constitutional issues surrounding the civil forfeiture statutes. It did, however, establish through dictum the aforementioned constitutional defense to forfeiture that at least one commentator has referred to as the "*Pearson Yacht* Defense."[131] Described as a "fairly narrow constitutional defense to forfeiture,"[132] this rationale was drawn from the court's reaffirmation that the innocence of the property owner is not a defense to an in rem forfeiture. However, "it would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property: for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[133] The courts have applied the defense on an "ad hoc basis"[134] and have either totally ignored the defense or applied a negligence standard.[135]

Among other constitutional issues that have been raised since the *Pearson Yacht* case, the one that seems to be creating interest on both sides of the issue is the constitutional concept of proportionality. The concept is founded on the eighth amendment right against cruel and unusual punishment.[136] The safe-

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[130] State Statutory Forfeiture Provisions for Controlled Substances Violations (National Institute of Justice, 1985) from a chart reprinted in D. SMITH, *supra* note 2, ¶ 4.03, at 4-76.1 app. 4A; *see* MISS. CODE ANN. §§ 41-29-153(a)(4)(A)-(C), (7)(A)-(B) (Supp. 1989).

[131] D. SMITH, *supra* note 2, ¶ 12.04, at 12-55.

[132] *Id.* ¶ 12.04, at 12-56.

[133] *Pearson Yacht*, 416 U.S. at 688-90.

[134] D. SMITH, *supra* note 2, ¶ 12.04, at 12-56 (list of state statutory provisions regulating forfeiture of controlled substances).

[135] *Id. Compare* United States v. One Boeing 707 Aircraft, 750 F.2d 1280, 1289 (5th Cir. 1985) (confiscation required even when lessors, bailors or secured creditors are innocent of any wrongdoing) *with* United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383, 1391 (W.D. Pa. 1979) (reasonable effort to prevent illegal use of property should prevent forfeiture). The innocent owner defense has been denied one who is a fugitive from justice. *See* United States v. One Parcel of Real Estate, 868 F.2d 1214, 1216 (11th Cir. 1989) (fugitive property owner precluded from contesting civil in rem forfeiture); *see also* text accompanying notes 182-91.

[136] U.S. CONST. amend. VIII; *see* United States v. Walsh, 700 F.2d 846, 857 (2d. Cir.) (eighth amendment may prohibit forfeiture of entire business where enterprise is sub-

guard is perceived to be necessary to prevent overzealous prosecutors from "producing penalties shockingly disproportional to the offense."[137] In two recent cases the United States Court of Appeals for the Ninth Circuit has remanded forfeiture awards to the district court, as there was a "prima facie showing that the forfeiture may have been excessive"[138] because there was relatively little illegal gain in proportion to its size and the legitimate income of the business.[139] Clearly the court considered the proportionality concept in remanding these cases.

It seems apparent, however, that the court differentiates between civil and criminal forfeiture cases. In another Ninth Circuit case, the court stated that "proportionality review is required in criminal forfeiture cases; the same is not true with regard to civil forfeiture proceedings, which are directed against the property itself and not the owner."[140] The court did add, however, that "in view of the absence of any proportionality review in the civil context, courts should decide in each such case whether judicial restraint should be exercised to limit the amount of property forfeited so as to avoid unfairness."[141] The United States Court of Appeals for the Fourth Circuit also refused to extend the constitutional proportionality argument to

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stantially engaged in legitimate business), *cert. denied*, 464 U.S. 825 (1983); United States v. Forty-eight Thousand, Five Hundred Ninety-five Dollars, 705 F.2d 909 (7th Cir. 1983) (civil forfeiture cause under 31 U.S.C. § 5317(c) (1988)); United States v. Huber, 603 F.2d 387, 397 (2d. Cir. 1979) (where forfeiture is keyed to magnitude of defendant's crime, eighth amendment prohibition against cruel, unusual punishment is not violated), *cert. denied*, 445 U.S. 927 (1980).

[137] United States v. Marubeni Am. Corp., 611 F.2d 763, 769 n.12 (9th Cir. 1980).

[138] United States v. Busher, 817 F.2d 1409, 1415-16 (9th Cir. 1987) (citing Solem v. Helm, 463 U.S. 277 (1983)).

[139] *Busher*, 817 F.2d at 1416. The court advocated caution in ordering "forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income." *Id.* at 1415-16. The court also stated that the eighth amendment would not normally be violated in ordering the forfeiture of all of a defendant's interest in an enterprise, "if illegal activity accounts for all or almost all of an enterprise's activity, or an interest in an enterprise was acquired entirely or almost entirely with ill-gotten funds." *Id.* at 1416.

[140] United States v. Tax Lot 1500, 861 F.2d 232, 233-34 (9th Cir. 1988) (eighth amendment defense inapplicable in civil forfeiture proceedings).

[141] *Id.* at 235.

civil forfeitures. In explaining its rationale, the court stated: "This trend reflects the recognition that to judicially encumber what clearly is intended to be a civil proceeding with criminal procedural safeguards is contrary to the plain dictates of Congress."[142]

Because of the issues surrounding the proportionality argument, it would be wise for prosecutors to acquaint themselves with the concept so that they may better address the issue when it is raised in their respective jurisdictions. It is apparent that the strongest case for a successful proportionality argument would be those involving criminal forfeitures. Although the two cases previously discussed virtually ruled out a successful proportionality challenge of a civil forfeiture, the concept still remains an equitable principle looming on the judicial horizon awaiting an ill-prepared or unwary prosecutor.

The constitutional safeguards of the fourth and fifth amendments have also been held to be applicable to civil forfeitures that are predicated on criminal conduct because they are considered quasi-criminal; therefore, any such seizures must be "reasonable" under the fourth amendment.[143] As discussed above, however, no pre-seizure notice and hearing are required to satisfy the fifth amendment due process clause as long as a prompt post-seizure hearing is available for those contesting the property's forfeitability,[144] and a seizure contrary to the fourth amendment does not automatically result in the dismissal of the forfeiture case. As long as the basis for the forfeiture of the seized property can be sustained by independent, untainted evidence, then the forfeiture can proceed.[145]

The constitutional issues surrounding the Mississippi forfeiture statutes are not limited to federal and state bill of rights

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[142] United States v. Santero, 866 F.2d 1538, 1544 (4th Cir. 1989) (criminal safeguards not applicable in civil forfeiture proceedings); *see supra* note 5.

[143] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 634-35 (1886) (seizures must be reasonable); United States v. Kemp, 690 F.2d 397, 401 (4th Cir. 1982) (same).

[144] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-79 (1974); Fuentes v. Shevin, 407 U.S. 67, 96 (1972).

[145] United States v. One 1978 Mercedes Benz, Four-door Sedan, 711 F.2d 1297, 1303 (5th Cir. 1983); United States v. One (1) Harley-Davidson Motorcycle, 508 F.2d 351, 351-52 (9th Cir. 1974) (per curiam).

considerations. There is a state constitutional provision which ostensibly controls the distribution of forfeited assets when forfeiture arises out of a criminal charge and is ordered by the criminal trial judge.[146] Section 261 of the Mississippi Constitution reads as follows: "The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun; and all fines and forfeitures shall be paid into the treasury of such county. Defendants, in cases of conviction, may be taxed with the costs."[147]

This section has caused some controversy in at least one judicial district in the state.[148] The issue surrounds the constitutionality of those statutes that control distribution of seized and forfeited assets.[149] Some legal authorities believe that section 261 requires that all assets forfeited, regardless of the nature of the forfeiture proceeding, must be deposited into the county general fund. The argument for the literal adherence to section 261, however, is based on a flawed premise. It is clear that section 261 was enacted as a means of reimbursing the counties for the expense of prosecution. The section was enacted when most forfeitures in this state were criminal forfeitures which were based on in personam jurisdiction. Civil in rem forfeitures under the Uniform Controlled Substances Law were not even contemplated when the section was created. Therefore, as a policy argument one could rationally argue that section 261 applies only to forfeitures that are premised on in personam jurisdiction, that are tried by the district attorney, and that arise out of criminal prosecution. The Mississippi Supreme Court has also interpreted the meaning of this section and found that "section 261 applies to fines and forfeitures that arise from criminal prosecutions and not to fines and forfeitures that arise from civil proceedings."[150]

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[146] MISS. CONST. art. XIV, § 261.

[147] *Id.*

[148] In the 19th Judicial District, a circuit judge believed all forfeited assets should be deposited in the county general fund pursuant to § 261 and must not be distributed in accordance with the statutes. *But see* Miss. Att'y Gen. Op. (Jan. 20, 1989) (disagreeing with judge's assessment).

[149] *See supra* text accompanying notes 94-98.

[150] State Bd. of Educ. v. Mobile & Ohio R.R., 71 Miss. 500, 502, 19 So. 445, 445

The procedure to follow in order to eliminate the potential for controversy is for a prosecutor to file and litigate a completely separate civil lawsuit. Any plea bargaining which may also settle the forfeiture of assets should remain separate, with the civil forfeiture aspects handled through a settlement agreement, if no petition is filed, or through an agreed order if a civil petition has been filed. The prosecutor and judge should avoid handling the forfeiture of assets through the sentencing order. If the assets are disposed of and distributed through the criminal sentencing order, then, pursuant to section 261, the value of the assets must accrue to the benefit of the county and be paid into the county treasury. The intentional circumvention of the forfeiture statutes by strategically forfeiting assets through the sentencing order is a clear example of the revenue production philosophy which unfortunately results in cash register justice.

Once the constitutional issues have been addressed, the chief remaining issues that tend to arise in forfeiture actions seem to relate primarily to the interpretation of the statutes.[151] As noted above, the Mississippi Supreme Court has issued opinions pertaining to this issue on only four occasions. The court has interpreted the statutory provisions that address promptness,[152] the innocent owner,[153] the burden of proof,[154] the civil

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(1893).

[151] Other issues addressed by courts have ranged from whether a house can be forfeited as a container, People v. Miscellaneous Items Named in Search Warrant, 44 CRIM. L. REP. (BNA) 2408 (Mich. Ct. App. 1988) (house was container when seven pounds of marijuana were found inside and owner admitted he distributed it from his house), to whether the illicit use of only a small portion of land renders the entire tract forfeitable. United States v. Reynolds, 856 F.2d 675, 676 (4th Cir. 1988) (even though only part of property was used to facilitate distribution of drugs, entire tract of land was subject to forfeiture).

[152] Lewis v. State, 481 So. 2d 842, 843 (Miss. 1985). In *Lewis*, the court held that filing the petition for forfeiture almost 18 months after the money was seized did not satisfy the promptness requirement. *Id.* The court stated that this 18-month delay was entirely too long without some excuse or justification. *Id.* at 844.

[153] Saik v. State, 473 So. 2d 188, 191 (Miss. 1985); Ervin v. State, 434 So. 2d 1324, 1326 (Miss. 1983). In *Saik* and *Ervin*, the court reversed forfeiture orders and rendered judgment for the innocent owners because their knowledge of or consent to the illegal activity was not sufficiently proven. *Saik*, 473 So. 2d at 191; *Ervin*, 434 So. 2d at 1326.

[154] Reed v. State, 460 So. 2d 115, 118 (Miss. 1984). In *Reed*, the court held that the state was required to prove forfeiture by a preponderance of the evidence. *Id.*

nature of the action,[155] and the scope of the civil forfeiture statutes in Mississippi.[156] There are, however, issues which have arisen in civil forfeiture actions and have been adjudicated in other states and on the federal level, which will sooner or later have to be addressed by Mississippi courts. The analysis of these issues is made easier by the fact that most civil forfeiture statutes in Mississippi mirror other statutes, specifically the federal forfeiture provisions.

The analysis of statutory interpretations should begin with section 41-29-153, which lists the property subject to forfeiture and describes the circumstances under which forfeiture may result. The primary issues that arise are the definitions or meanings of certain terms within the statute's provisions—for example, interpretations as to what property is considered a "container" under section 41-29-153(a)(3); or the meaning of the terms "facilitate"[157] and "proceeds;"[158] or what act actually constitutes an exchange[159] which would subject money or other assets to seizure and forfeiture. Each of these issues has been raised in state courts in Mississippi, but there have as yet been no interpretations by the Mississippi Supreme Court. However, these issues have been raised, defined, and interpreted by other jurisdictions. For example, while the term "facilitate" has not been defined by statute, a commonly accepted definition of the term is "to make easier or less difficult";[160] and one court defined it as "to make easy, to promote, to help forward."[161] This very broad definition of facilitation lends itself to a wide range of applications in the field of civil forfeiture. The application is

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[155] *Id.* The court noted that Reed was not charged with illegal conduct in the present case. *Id.* Thus, the state only need prove that the "seized items were possessed by Mr. Reed with intent to be used in connection with an illegal smuggling conspiracy." *Id.*

[156] *Id.* The court stated that before forfeitures will be granted, they must come strictly within the terms of the forfeiture statute. *Id.*

[157] MISS. CODE ANN. § 41-29-153(a)(4) (Supp. 1989).

[158] MISS. CODE ANN. § 41-29-153(a)(7) (Supp. 1989).

[159] *Id.*

[160] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 812 (1971); *see also* United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 157 (3d Cir. 1981) (considering statutory meaning of "facilitate"; whether use of automobile made sale less difficult), *cert. denied*, 454 U.S. 818 (1982).

[161] United States v. One 1941 Pontiac Sedan, 83 F. Supp. 999, 1000 (S.D.N.Y. 1948).

made even broader when modified by the term "in any manner," as it has been in both the Mississippi statute[162] and the federal statute.[163] The facilitation provision seems to be recognized by the courts as a principle that Congress meant to be broadly applied and has proved to be an effective means for forfeiting assets, especially on the federal level.[164]

Another issue commonly raised when a conveyance is seized is whether tools and appurtenances within the vehicle are also forfeitable under the facilitation rationale. The United States Court of Appeals for the Fifth Circuit addressed this issue in *United States v. One 1978 Mercedes Benz Four-Door Sedan.*[165] In this case, a car telephone was the subject of controversy, and the district court judge ruled that the car phone was not subject to forfeiture and ordered that it be returned to the claimant.[166] The court of appeals affirmed the decision of the district court and indicated a recognition that, even though the statutory intent was that items permanently attached to the vehicle be forfeited, there was a "need to distinguish between the vehicle and what would be considered separate personal property inside the vehicle."[167] In deciding the issue, the court relied upon the law of fixtures rather than forfeiture and declared that, although the analogy of real estate transfers to forfeitures "was not com-

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[162] MISS. CODE ANN. § 41-29-153(a)(7) (Supp. 1989).

[163] 21 U.S.C. § 881(a)(4) (1982).

[164] *See, e.g.*, United States v. One 1977 Lincoln Mark V. Coupe, 643 F.2d. 154, 157 (3d Cir. 1981) (facilitation by conveyance), *cert. denied*, 454 U.S. 818 (1982); United States v. One 1971 Porsche Coupe Automobile, 364 F. Supp. 745, 749 (E.D. Pa. 1973) (facilitation by transportation); *see also* United States v. Beechcraft Aircraft, 691 F.2d 725, 726 (5th Cir. 1982) (aircraft used to transport raw materials used in amphetamine production); United States v. Mercury Cougar, 666 F.2d 228, 230 (5th Cir. 1982) (laying groundwork for unlawful activity); United States v. 1977 Cadillac, 644 F.2d 500, 503 (5th Cir. 1981) (transporting participants to site of illegal transaction); United States v. 1974 Cadillac, 548 F.2d 421,426 (2d Cir. 1977) (transporting participants to site of illegal transaction); United States v. 1968 Ford, 425 F.2d 1084, 1085 (5th Cir. 1970) (providing interference for fleeing wrongdoers); United States v. 1974 Lincoln Continental, 574 F. Supp. 156, 159 (N.D. Ohio 1983) (transporting money for illegal transaction); United States v. Certain Real Property Situated at Rt. 3 Box 2217E, Mt. Home, Ark., 568 F. Supp. 434, 435 (W.D. Ark. 1983); United States v. One 1980 BMW, 559 F. Supp. 382, 385 (E.D.N.Y. 1983) (providing means of surveillance or lookout).

[165] 711 F.2d 1297 (5th Cir. 1983).

[166] *Mercedes Benz*, 711 F.2d at 1305.

[167] *Id.* at 1304.

plete," it was "the closest established field of law on which we may draw."[168]

When the facilitation concept is applied to money, it creates confusion on the part of many prosecutors and most defense attorneys. Money that in any manner facilitates the violation of the Controlled Substances Law is subject to forfeiture.[169] The reason for the confusion is the failure to distinguish facilitation from the exchange and proceeds provisions. Most defense attorneys and some prosecutors react to this type of lawsuit thinking that the process can be short-circuited by a sheaf of documents establishing the origin or pedigree of the cash. They incorrectly believe that, if the cash is from a legitimate source, then the forfeiture provisions do not apply. This is a false assumption which is usually the result of failing to recognize the issue. The issue becomes clear upon analysis of the cases dealing with facilitation and proceeds with a distinction between the two concepts. When the government authorities litigate against money for violating the facilitation provisions, the pedigree of the money is not relevant. It is not the origin of the money that is at issue, but its use or intended use. Accordingly, in order for the government to prove facilitation, it need only show that money was used or intended to be used to facilitate the violation of the Controlled Substances Law.[170] The facilitation provision does require some connection between the money and the underlying violation of the Controlled Substances Law, however. The mere presence of cash without some other nexus with the violation of the statute is not sufficient to warrant seizure or forfeiture.[171]

The exchange provisions are the only other provisions that

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[168] *Id.*

[168] MISS. CODE ANN. § 41-29-153(a)(7) (Supp. 1989).

[170] *Id.*

[171] Any forfeiture provision using the term "facilitate" raises a question concerning the substantiality of the nexus required between the property and the prohibited activity. On the federal level, Congress explained in the Joint Explanatory Statement:

> Any monies, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent. Controlled Substance Act, 1978 U.S. CODE CONG. & ADMIN. NEWS 9522 (codified at 21 U.S.C. 841(b)).

deal specifically with the forfeiture of cash. The cash directly acquired in exchange for the drugs is not "proceeds"; it is "money . . . furnished . . . in exchange for a controlled substance forfeitable under the exchange provision."[172] The proceeds provisions, on the other hand, do not pertain to cash. As one author stated, "[p]roceeds means property derived from money (or other things of value) directly exchanged for drugs, *i.e.*, property acquired with the profits of drug trafficking."[173]

The author goes on to explain, "If cash acquired in exchange for drugs is used to purchase a house and the house is later sold for cash, that cash is 'proceeds' . . . but the original cash obtained from the sale of the drugs is not."[174] In addition, the traceable proceeds provision[175] has caused interpretation questions in cases involving bank accounts.[176] The majority of cases involving large cash hoards are premised on the exchange provisions.[177]

Finally, two commonly raised issues should be addressed in order to clarify the legislative intent behind the enactment of the exception. The innocent owner[178] and the innocent lienholder provisions[179] of the Controlled Substances Law are

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[172] D. SMITH, *supra*, note 2, ¶ 4.03, at 4-32.

[173] *Id.*

[174] *Id.*

[175] MISS. CODE ANN. § 41-29-153(a)(7) (Supp. 1989).

[176] United States v. Banco Cafetero Panama, Banco, 797 F.2d 1154, 1161-62 (2d Cir. 1986). The issue is whether or not a bank account which is ostensibly an intangible debt is "traceable proceeds" subject to forfeiture. *Id.* The *Banco Cafetero Panama, Banco*, case answers this question in the affirmative:

> Nothing in the terms or legislative history of the forfeiture statute gives the slightest reason to believe that congress wished to accord banks any special insulation from vulnerability to forfeiture of assets traceable to drug proceeds. On the contrary congressional concern with money laundering points in precisely the opposite direction.

Id. at 1162.

[177] *See, e.g.*, United States v. Thirteen Thousand Dollars in United States Currency, 733 F.2d 581, 585 (8th Cir. 1984) (discussion of forfeiture based on exchange provision); United States v. $84,000 U.S. Currency, 717 F.2d 1090, 1101-02 (7th Cir. 1983) (same), *cert. denied sub nom.* Holmes v. United States, 469 U.S. 836 (1984); United States v. Eighty Three Thousand Three Hundred Twenty Dollars ($83,320) in United States Currency, 682 F.2d 573, 577-78 (6th Cir. 1982) (same); United States v. $131,602.00 in U.S. Currency, 563 F. Supp. 921, 923 (S.D.N.Y. 1982) (same).

[178] MISS. CODE ANN. § 41-29-153(a)(4)(A),(B) (Supp. 1989).

[179] MISS. CODE ANN. § 41-29-153(a)(4)(C) (Supp. 1989).

modeled after the federal statutes[180] and result from the seemingly harsh results evidenced in *Pearson Yacht*.[181] In *Pearson Yacht* the Supreme Court indicated in dicta that if the owner is a non-consenting party to the illegal activity, it may be unconstitutional to deprive him of his property because of the wrongdoing of another person.[182] The claimant/owner must establish that he was not involved in or aware of the unlawful conduct giving rise to the forfeiture and that he took all precautions that could reasonably be expected to prevent the proscribed use.[183] A lack of awareness is insufficient to justify application of the defense.[184] However, the innocent-owner defense provided by statute is difficult to overcome without evidence of some substantial knowledge about or complicity in the underlying violation.[185] The Mississippi Supreme Court stated in *Saik*: "We note that there may be cases in the future, with additional essential facts proved, where forfeiture would be justified and required."[186] This statement by the court seems to recognize that the statutory innocent-owner defense and its sibling, the innocent lienholder defense, are rebuttable defenses. In *Pugh v. State*,[187] the Alabama Supreme Court supported this contention, allowing forfeiture over an innocent-owner claim when it was proved that the brother of the owner was arrested for violating the Alabama Controlled Substances Act while driving the car of his sibling.[188] The prosecutor produced evidence that the driver brother was well known in the community as a drug dealer and the owner brother knew or should have known of his drug-dealing activi-

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[180] 21 U.S.C. § 881(a)(6)(7) (1982).

[181] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974); *see supra* notes 128-32 and accompanying text.

[182] *Pearson Yacht*, 416 U.S. at 689-90.

[183] *Id.*

[184] United States v. One 1977 Cherokee Jeep, 639 F.2d 212, 213 (5th Cir. 1981) (per curiam) (suspicion of another's involvement in illegal activities is enough to trigger need for owner to take precautionary measures); *see also* United States v. One 1980 BMW 320I, 559 F. Supp. 382, 386 (E.D.N.Y. 1983).

[185] Saik v. State *ex rel.* Mississippi Bureau of Narcotics, 473 So. 2d 188, 191 n.3 (Miss. 1985); Ervin v. State, 434 So. 2d 1324, 1326 (Miss. 1983).

[186] *Saik*, 473 So. 2d 188, 191 n.3 (Miss. 1985).

[187] 441 So. 2d 931 (Ala. 1983).

[188] *Pugh*, 441 So. 2d at 933.

ties.[189] The innocent-owner provisions of the Alabama statute[190] are identical to those in Mississippi and thus support a contention that once an owner or lienholder is put on notice, but fails to take reasonable steps to protect his interest against unlawful use, then he can no longer successfully cloak himself in the innocent-owner defense.[191]

V. Conclusion

The concept of civil forfeiture fits easily within the field of criminal justice. The obvious value of its deterrent effect makes it a viable new weapon in our law enforcement arsenal. However, the key to the successful use of the civil forfeiture statute is the recognition of its value not only to deter, but also to remediate by attacking the economic kingdoms of organized drug traffickers. There must be a commitment not only to remove the organization from the kingpin, but also to strip the economic infrastructure of the organization. It is imperative that we as a state and nation recognize that it is morally wrong to settle for the incarceration of a mere serf while continuing to allow the kingpin and his economic kingdom to remain in place. The effective and efficient use of new law enforcement techniques is called for, and we must be willing to support and defend the people's right to the most effective and constitutionally correct enforcement tactics available. The civil forfeiture statutes provide but one of these new law enforcement tools. But, as with any law enforcement tool, abuse and misapplication can mitigate or nullify its value.

It is essential when considering the use and distribution of seized funds that we keep in focus the overall goal of our civil forfeiture statutes goals premised on a philosophy of economic sanction and not merely as a means of revenue production. As long as the forfeited assets are turned against the beast that pro-

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[189] *Id.* at 932.

[190] Ala. Code § 20-9-93(a)(4)(b) (1975). The Alabama statute provides: "No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the knowledge or consent." *Id.*

[191] For an interesting commentary on the innocent-owner defense, see Strafer, *supra* note 82.

duced them, the economic sanction ideal can be maintained. Once we allow ourselves the comfort of relying on easy money, however, street improvements and school bus purchases suddenly become a higher priority. The revenue production philosophy at the very least threatens the resources with which the war on drugs can be fought. Furthermore, because of its insidious attraction, this approach may result in a more widespread practice of what many in criminal justice have recognized and termed "Cash Register Justice." The practice of seizing assets, usually large cash hoards, from drug traffickers and dropping charges or plea bargaining felonies to misdemeanors, all in exchange for uncontested forfeitures, is accepted by too many law enforcement officials and prosecutors. This business-as-usual attitude neglects the constitutional due process rights of many detainees and amounts to little more than extortion under the color of law. In too many instances the defendants' attorneys are willing participants in the "give-up-the-money-and-walk" approach. We are all responsible for the actions of our public officials who administer, adjudicate, and enforce statutes. It is of paramount importance that we continue to hold these public officials accountable in their use or abuse of those statutes which provide for civil forfeiture.

(Administrative Forfeiture Guideline Form I)

NOTICE OF INTENTION TO FORFEIT SEIZED PROPERTY

A To: *(Insert name and address of person or persons in possession at time of seizure and/or any other interested parties ie: innocent owner; lienholder)* Case No. *(Agency case number)*

B You are hereby notified that on *(date)* in *(County)*, MS, the below listed property was seized by *(herein insert name of seizing agency)* pursuant to Section 41-29-176, Mississippi code of 1972, which provides for administrative forfeiture of property other than a controlled substance, raw material or paraphernalia seized under the Uniform Controlled Substances Law, the value of which does not exceed $5,000.00.

C **DESCRIPTION OF PROPERTY:**

(Property must be described in such a manner as to clearly indicate the exact property seized ie: VIN # or Serial # included in description)

D **APPROXIMATE VALUE:**

(Value can be approximated but it should be based on some logical standard ie; Black Book value for vehicles)

E *(Explain connection between property and violation of the Uniform Controlled Substances Law)* ***(See Attachment A Forms 1-7 for suggestions)***

F If you desire to contest the forfeiture of this property, you must within thirty (30) days of receiving this notice, file a request for judicial review.

G If you do not request judicial review within thirty (30) days of receiving this notice, the property described below will be forfeited to *(herein insert name of seizing agency)*, to be used, distributed, or disposed of in accordance with the provisions of section 41-29-181, Mississippi code of 1972.

H Instruction for filing request for Judicial Review

In order to file a request for Judicial Review you must respond in writing and you should express what your interest is in the property, and why you do not believe it should be forfeited. If you file such a request, it should be sent by Certified Mail to the following address:

(List Agency Name and
Name and address of Attorney
who provided Notice)

I If you request Judicial Review, A Forfeiture Petition shall then be filed by the *(seizing agency)* in the appropriate court.

Dated this _____ day of _____, 1988.

_____

NOTICE PROVIDED BY:

J *(List name and title of attorney filing notice)*
NOTE: NOTICE **MUST BE PREPARED AND SIGNED BY AN ATTORNEY** LICENSED TO PRACTICE IN THE STATE OF MISSISSIPPI.

(Administrative Forfeiture Guideline Form I Attachment A)

FORM EXPLANATION TO DESCRIBE CONNECTION BETWEEN PROPERTY AND VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES LAW

FORM 1 — USE WHEN ONLY VEHICLE(S) SEIZED

Said vehicle being subject to forfeiture under the provisions of Section 41-29-153(a)(4) of the Mississippi Code of 1972, as amended, having been used, to transport or to facilitate the transportation, sale, receipt, possession or concealment of controlled substances in violation of the Mississippi Uniform Controlled Substances Law.

FORM 2 — USE WHEN VEHICLE(S) AND MONEY ARE SEIZED AND MONEY IS FOUND IN CLOSE PROXIMITY TO CONTROLLED SUBSTANCES

Said vehicle(s) being subject to forfeiture under the provisions of Section 41-29-153(a)(4) of the Mississippi Code of 1972, as amended, having been used, or intended for use, to transport or to facilitate the transportation, sale, receipt, possession or concealment of controlled substances in violation of the Mississippi Uniform Controlled Substances Law, and said money being subject to forfeiture under the provisions of Section 41-29-153(a)(5) and 41-29-153(a)(7) of the Mississippi Code of 1972, as amended, having been used, or intended for use in violation of the Mississippi Uniform Controlled Substances Law and having been found in close proximity to forfeitable controlled substances, to-wit:_____.

FORM 3 — USE WHEN VEHICLE(S) AND MONEY ARE SEIZED BUT NOT FOUND IN CLOSE PROXIMITY TO CONTROLLED SUBSTANCES

Said vehicles(s) being subject to forfeiture under the provisions of Section 41-29-153(a)(4) of the Mississippi Code of 1972, as amended, having been used, or intended for use, to transport or to facilitate the transportation, sale, receipt, possession or concealment of controlled substances in violation of the Mississippi Uniform Controlled Substances Law, and said money being subject to forfeiture under the provisions of Section 41-29-153(a)(5) of the Mississippi Code of 1972, as amended, having been used, or intended for use in violation of the Mississippi Uniform Controlled Substances Law.

FORM 4 — USE WHEN ONLY MONEY IS SEIZED AND IT IS FOUND IN CLOSE PROXIMITY TO CONTROLLED SUBSTANCES

Said money being subject to forfeiture under the provisions of Section 41-29-153(a)(5) and 41-29-153(a)(7) of the Mississippi Code of 1972, as amended, having been used, or intended for use, in violation of the Mississippi Uniform Controlled Substances Law and having been found in close proximity to forfeitable controlled substances, to-wit: _____

FORM 5 — USE WHEN ONLY MONEY IS SEIZED AND IT IS NOT FOUND IN CLOSE PROXIMITY TO CONTROLLED SUBSTANCES

Said money being subject to forfeiture under the provisions of Section 41-29-153(a)(5) of the Mississippi Code of 1972, as amended, having been used, or intended for use, in violation of the Mississippi Uniform Controlled Substances Law.

FORM 6 — **USE WHEN ANY PROPERTY OTHER THAN VEHICLE, MONEY AND GUNS SEIZED**

Said property being subject to forfeiture under the provisions of Section 41-29-153(a)(7) of the Mississippi Code of 1972, as amended, having been used, or intended for use, in violation of, or to facilitate the violation of the Mississippi Uniform Controlled Substances Law.

FORM 7 — **USE WHEN MONEY IS FOUND IN CLOSE PROXIMITY AND OTHER PROPERTY NOT FOUND IN CLOSE PROXIMITY**

Said property being subject to forfeiture under the provisions of Section 41-29-153(a) of the Mississippi Code of 1972, as amended, having been used in violation of or to facilitate the violation of the Mississippi Uniform Controlled Substances Law, and said property being subject to forfeiture under the provisions of Section 21-29-153(a)(5) and 41-29-153(a)(7) of the Mississippi Code of 1972, as amended, having been used, or intended for use in violation of or to facilitate the violation of the Mississippi Uniform Controlled Substances Law and having been found in close proximity to forfeitable controlled substances, to wit:_____.

(Administrative Forfeiture Guideline Form II)

STATE OF MISSISSIPPI

COUNTY OF _____

DECLARATION OF FORFEITURE

On (*DATE*), Notice of Intention to Forfeit Seized Property was given to (*INSERT NAME OR NAMES OF PERSONS IN POSSESSION AT TIME OF SEIZURE AND ANY INTERESTED PARTIES*) by (*INSERT CERTIFIED MAIL OR PUBLICATION*) pursuant to Section 41-29-176 of the Mississippi Code of 1972, as amended. Said Notice required any interested party to file a Request for Judicial Review within thirty (30) days after the (*RECEIPT/PUBLICATION*) of the Notice, or the property described below would be forfeited to (*HEREIN INSERT NAME OF SEIZING AGENCY*).

More than thirty (30) days have elapsed since the date on which the Notice of Intention to Forfeit Seized Property was (*RECEIVED/PUBLISHED*) and no Request for Judicial Review has been filed.

IT IS, THEREFORE, hereby declared that (*HEREIN DESCRIBE PROPERTY WITH VIN # OR SERIAL NUMBER, ETC.*) is forfeited to (HEREIN INSERT NAME OF SEIZING AGENCY) to be distributed, used, or disposed of according to law.

SO DECLARED, on this the _____ day of _____, 1988.

_____

(*List Name and Title of Attorney filing declaration*)
NOTE: DECLARATION MUST BE PREPARED AND SIGNED BY AN ATTORNEY LICENSED TO PRACTICE IN THE STATE OF MISSISSIPPI.

STATE OF MISSISSIPPI

COUNTY OF _____

This day personally appeared before me, the undersigned authority in and for the State and County aforesaid, the above named (*HEREIN INSERT NAME OF ATTORNEY*) who solemnly and truly declared and affirmed before me that matters and facts set forth in the foregoing Declaration of Forfeiture are true and correct as herein stated.

Affirmed and Subscribed before me on this the _____ day of _____, 1988.

_____

NOTARY PUBLIC

My Commission Expires:

_____

(Administrative Forfeiture Guideline Form III)

NOTICE OF DECLARATION OF FORFEITURE

To: *(Insert name and address of person or persons in possession at time of seizure and/or interested parties)*

Case No. *(Agency case number)*

YOU WERE NOTIFIED OF THE INTENTION TO FORFEIT THE BELOW LISTED PROPERTY. AT THE TIME OF THAT NOTIFICATION YOU ALSO WERE GIVEN DIRECTIONS WHICH WOULD ALLOW YOU TO CONTEST THIS FORFEITURE. HOWEVER, THE THIRTY (30) DAY TIME LIMIT IMPOSED BY THE STATUTE HAS EXPIRED AND NO CLAIM HAS BEEN FILED. THEREFORE, YOU ARE HEREBY NOTIFIED THAT ON *(DATE)* THIS PROPERTY WAS FORFEITED BY *(HEREIN INSERT NAME OF SEIZING AGENCY)* PURSUANT TO THE MISSISSIPPI UNIFORM CONTROLLED SUBSTANCE LAW (Section 41-29-101 et. seq.).

DESCRIPTION OF PROPERTY FORFEITED:

(Property must be described in such a manner as to clearly indicate the exact property seized ie: VIN # or Serial # included in description)

Dated this _____ day of _____, 1988.

_____

(List name and title of attorney filing notice)

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COMMENTS

HEDONIC DAMAGES

Introduction

Recent cases illustrate a developing trend in some jurisdictions to expand recoverable damages in wrongful death and personal injury actions by allowing juries to consider awarding "hedonic" damages, or the nonpecuniary aspect of damages.[1] For instance, courts hearing personal injury actions have found the "loss of enjoyment of one's life" to be an additional element of recoverable damages.[2] However, while the trend appears to be moving in the direction of recognizing this additional element of damages, courts in other jurisdictions have refused to follow this approach on the ground that any award to a plaintiff for the loss of enjoyment of life would be an impermissible duplication of already existing elements of damage.[3] In wrongful death cases, "loss of life's pleasure" has been held to be a recoverable element of damages.[4] However, opponents of this type of damages argue that this measure is

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[1] *See, e.g.*, Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985) (allowing hedonic damages in wrongful death case brought under 42 U.S.C. § 1983 (1982)), *aff'd*, 827 F.2d 195 (1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988); McDougald v. Garber, 136 A.D.2d 80, 524 N.Y.S.2d 192, 200 (1988) (allowed recovery for loss of enjoyment of life in personal injury action).

[2] *See, e.g.*, *McDougald*, 524 N.Y.S.2d at 200 (held recovery for loss of enjoyment of life separate and distinct from pain and suffering).

[3] *See, e.g.*, First Trust Co. v. Scheels Hardware, 429 N.W.2d 5, 13-14 (N.D. 1988) (refusal to give instruction on loss of enjoyment of life was proper; it would have been appropriate for plaintiff to have argued loss of enjoyment of life as component of pain and suffering).

[4] Sherrod v. Berry, 827 F.2d 195 (1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988). This suit was brought under 42 U.S.C. § 1983 (1982). *Sherrod*, 827 F.2d at 198.

too speculative,[5] that it undermines the compensatory nature of our legal system,[6] and that it does not achieve our legal system's primary goal of making the plaintiff whole.[7] This comment will first provide an overview of what hedonic damages are and then address the propriety of awarding hedonic damages in both personal injury and wrongful death cases, including a separate analysis of Mississippi law for each.

I. What Is Hedonic Damage?

Hedonic damage refers to the loss of the value of life itself.[8] A strange and often unfamiliar word, "hedonic" has its roots in the Greek word "hedone," which generally denotes pleasure.[9] In tort actions, these damages refer to the loss of the pleasure of living, separate and distinct from economic damages.[10] In *Sherrod v. Berry*,[11] a federal district court adopted the view "that the hedonic value encompasses the totality of a person's existence, including the moral and philosophical value that society places on life."[12]

Hedonic damages in the legal sense refer to the loss of hedonic attributes of life, which differ from the loss of pecuniary or economic attributes of life.[13] This distinction is not always clear. Pecuniary losses include such things as lost future earnings and medical expenses, whereas hedonic damage includes loss of attributes that relate to the pleasure of being alive.[14] These hedonic attributes may refer to a person's location: Is the area a nice place to live, considering the air quality, the weather, or the availability of a quality education?[15] On the

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[5] Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D.L. Rev. 561, 569 (1987).

[6] *Id.* at 566.

[7] 1 M. Minzer, J. Nates, C. Kimball, D. Axelrod & B. Goldstein, Damages in Tort Actions § 1.00, at 1-3 (1987)[hereinafter Damages in Tort Actions]. Making a plaintiff "whole" means to put the injured party in the same position he would have been had the injury not occurred. *Id.*

[8] *Id.* § 23.18, at 23-30.1.

[9] *Id.* (citing The American Heritage Dictionary of the English Language 610 (1973)).

[10] *Id.*

[11] 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988).

[12] *See Sherrod*, 629 F. Supp. at 163. *See generally* Smith, *Hedonic Damages in Wrongful Death Cases*, A.B.A. J., Sept. 1988, at 70 (explaining that hedonic damages encompass value of human life).

[13] Smith, *supra* note 12, at 72.

[14] *Id.*

[15] *Id.*

other hand, economic valuation would be the same for the same injury in two different locations if the injured person's projected income, expenses, and life expectancy were the same.[16]

There are two distinct kinds of hedonic damages. The first is generally called "loss of enjoyment of life."[17] This type of damage occurs while a person is living, and it ends at a person's death.[18] Many jurisdictions have adopted this type of hedonic damage.[19] More controversial is the second type of hedonic damage, which is commonly referred to as "loss of life's pleasures." In contrast to the damages awarded for "loss of enjoyment of life," this type of damage commences at the death of the injured.[20] Not surprisingly, this form of hedonic damage is a recent development in American jurisprudence.[21] One of the simplest

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[16] *Id.* Smith provides four assumptions that simplify the analysis of the hedonic value of life for our purposes and for purposes of presentation to a jury: (1) Hedonic value is not dependent upon financial value; (2) Hedonic value is "independent of social rank, education, wealth, gender, family position or other such characteristics;" (3) Hedonic value does relate to life expectancy; and (4) Hedonic value of each year has a zero real discount rate. *Id.* For an explanation for each of these assumptions, see Smith, *supra* note 12.

[17] Comment, *Establishing Recovery for Loss of Enjoyment of Life Apart from Conscious Pain and Suffering*: McDougald v. Garber, 62 ST. JOHN'S L. REV. 332, 333-34 (1988). There is no easy way to explain exactly what damages for loss of enjoyment of life entail, except that they are hedonic, or nonpecuniary. The question of what loss of enjoyment of life specifically includes has a direct bearing on its propriety and therefore is discussed in the text.

[18] Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 393 A.2d 1188, 1190 (1978). In *Willinger*, the court distinguished the injury of loss of life from injuries in which one is "condemned to watch life's amenities pass by." *Willinger*, 393 A.2d at 1191. The latter injuries are compensable under the provision for damages of "loss of enjoyment of life." *Id.* Since the essence of "loss of enjoyment of life" is that the injured party has been rendered incapable of participating in certain activities allegedly due to the defendant's act, recovery under this damage provision is available exclusively to living plaintiffs. *Id. See generally* 2 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 8:20, at 569-73 (1985) ("loss of enjoyment of life" in some states is only recoverable by a living plaintiff); 3 DAMAGES IN TORT ACTIONS, *supra* note 7, § 23.18, at 23-30.2 to 23-30.4 (same).

[19] *See generally* Hermes, *supra* note 5, at 564-87 (provides list of jurisdictions allowing loss of enjoyment of life and treatment of this element of damage).

[20] 3 DAMAGES IN TORT ACTIONS, *supra* note 7, § 23.18, at 23-30.5.

[21] Comment, *Hedonic Damages in Section 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, 44 WASH. & LEE L. REV. 321, 326 (1987). Apparently, " '[t]here is no precedent for awarding damages based on evidence of the value of enjoyment of life . . . .' " Blodgett, *Hedonic Damages*, A.B.A. J., Feb. 1985, at 25 (quoting Andrew Horwitz, plaintiff's attorney in Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988)). It has been recognized that *Sherrod* was "the first United States court to describe a dam-

and most accurate definitions of "loss of life's pleasures" was suggested in a dissenting opinion of the Mississippi Supreme Court as the "non-pecuniary utility to the deceased of his life expectancy."[22] In order to minimize confusion, this comment describes hedonic damages before death as the "loss of enjoyment of life" and refers to hedonic damages after death as the "loss of life's pleasures." Additionally, as a further point of clarification, the generic term "hedonic damages" is all inclusive and refers generally to both types of damages.

II. Loss of Enjoyment of Life

The first type of hedonic damage is "loss of enjoyment of life." Damages for this type of hedonic damage begin to accrue when an injury is inflicted and continues until either the death of the injured (if the injury is permanent) or recovery of the injured from the injury.[23] However, there are presently two ongoing controversies surrounding the award of damages for loss of enjoyment of life. The first pertains to whether awarding damages for loss of enjoyment of life is too speculative.[24] The second issue drawing criticism and sparking controversy concerns whether awarding damages for loss of enjoyment of life is duplicative of other elements of damage.[25]

With regard to the first issue, most of the case law standing for the proposition that recovery for loss of enjoyment of life is too speculative stems from older decisions.[26] Generally, the rationale employed in such older cases was that a jury is unable to form a sound basis on which to compute damages for loss of enjoyment of life.[27] This rationale is accurately exemplified in the 1938 case of *Hogan v. Sante Fe Trail.*[28]

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age award for the value of a decedent's life as damages for the hedonic value of a decedent's life." Comment, *supra*, at 326.

[22] McGowan v. Estate of Wright, 524 So. 2d 308, 313 (Miss. 1988) (Robertson, J., dissenting).

[23] *Willinger*, 393 A.2d at 1190.

[24] Hermes, *supra* note 5, at 566; *see also*, Marcotte, *Lost Pleasure Suit*, A.B.A. J., Apr. 1990, at 30.

[25] *Id.* at 569.

[26] *Id.* at 565.

[27] *Id.* at 565-66.

[28] 148 Kan. 720, 85 P.2d 28 (1938); *see* Hanson v. Reiss S.S. Co., 184 F. Supp. 546, 552 (D. Del. 1960) (loss of enjoyment of life is injury for which damages are too speculative to grant award); Apperson v. Security State Bank, 215 Kan. 724, 528 P.2d 1211, 1220 (1974) (no recovery in law where damages cannot be shown with reasonable certainty); Ducoin v. Morris, 177 Kan. 158, 277 P.2d 587, 593 (1954) (Wendell, J., concurring in part, dissenting in part) (damages which are remote, contingent, and speculative are not proper elements upon which to have recovery).

Therein, the plaintiff, a professional violinist, injured his hand when the defendant, while driving a truck, negligently struck the plaintiff's car.[29] The jury awarded the plaintiff $4,000 for his loss of enjoyment of life caused by his post-accident inability to continue his career as a violinist.[30] On appeal, the Kansas Supreme Court reversed the verdict on the ground that "the loss of enjoyment resulting from being unable to play the violin is too speculative and conjectural to form a sound basis for the assessment of damages."[31] One might note that this same criticism was also formerly made of other elements of damage that are commonly allowed by our courts today, including pain and suffering, loss of consortium, disabilities, and mental anguish.[32]

More recently, the issue of speculative evidence was addressed by the court in *Sherrod v. Berry*.[33] The court espoused the theory that any legitimate evidence tending to show damages, or their amount, may be admitted to help the jury make an accurate estimate of those damages.[34] The district court further stated that "[t]he fact that the hedonic value of a human is difficult to measure did not make . . . [t]he . . . testimony or the damages speculative."[35] The *Sherrod* court

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[29] *Hogan*, 85 P.2d at 29.

[30] *Id.* at 31.

[31] *Id.* at 33. At the time, many courts had held that under some circumstances, loss of enjoyment of life was a proper element of damages in a personal injury action. Hermes, *supra* note 5, at 566 n.21. The *Hogan* court distinguished these previous cases by relying on the principle that recovery may not be had where the *cause* of an injury is too remote and the alleged *resulting damages* are too conjectural to form a basis of judgment. *Id.*

[32] 3 DAMAGES IN TORT ACTIONS, *supra* note 7, § 23.18, at 23-30.2 to -30.3. Certain types of damages have been discussed in terms of their potential for speculativeness. Comment, *supra* note 21, at 342; *see, e.g.*, Coppinger v. Broderick, 37 Ariz. 473, 295 P. 780, 781 (1931) (future pain and suffering); Ball v. T.J. Pardy Constr. Co., 108 Conn. 549, 143 A. 855, 856 (1928) (lost profits); Walton v. City of Bozeman, 179 Mont. 351, 588 P.2d 518, 522 (1978) (future damages generally); Dunham v. Stone, 96 N.H. 138, 71 A.2d 412, 414 (1950) (prospective damages).

[33] 629 F. Supp. 159, 164 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988).

[34] *Sherrod*, 629 F. Supp. at 164.

[35] *Id.* As well as testifying to the economic value of life, the expert in *Sherrod* gave some "insight [to the jury] into the guidelines that economists use in looking at how society values what we call the hedonic aspect, the hedonic value of life, separate from economic productive value of an individual." *Id.* at 162. The expert also mentioned there are economic studies that "indicate that a human life has value separate from the economic productive value that a human being would have." *Id.* The expert concluded that studies show there is a relationship between economic and hedonic damages, with hedonic damages ranging from three to thirty times the economic value of the life. *Id.* at 163.

adopted the principle that damages are not speculative just because they are difficult to measure in monetary terms.[36] Similarly, in a more recent decision, the rationale that damages cannot be recovered for loss of enjoyment of life because they are too speculative has even been termed "obsolete."[37]

In spite of some minor skirmishes of little significance concerning the speculativeness of hedonic damages,[38] the validity of such an argument has largely been attenuated.[39] However, unlike the speculativeness argument, the controversy surrounding the duplicative element of damages for loss of enjoyment of life still sparks emotions. Accordingly, the pertinent controversy over awarding damages for loss of enjoyment of life entails whether it is already a component of another element of damage, or whether loss of enjoyment of life is a separate element of damage requiring a separate jury instruction.[40] As should be apparent, interwoven with this issue is whether a separate award for loss of enjoyment of life functions as an inequitable duplication of

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[36] *Id.* at 163. In *Hogan* the court relied on the principle that where the cause of the injury is too remote or the damage is too conjectural, no award may be made. *Hogan*, 85 P.2d at 32. In contrast, the *Sherrod* court held that where the cause has been established, any legitimate evidence showing the resulting damage is admissible. *Sherrod*, 629 F. Supp. at 164.

[37] Mariner v. Marsden, 610 P.2d 6, 12 n.3 (Wyo. 1980). The court considered 10 cases cited in the appellant's brief for the proposition that loss of enjoyment of life is not a separate compensable element. *Id.* The dates of these cases ranged from 1890 to 1949. *Id.* This court did allow recovery for loss of enjoyment of life, but there was no recovery for permanent disability. *Id.* at 7 n.1.

[38] Hermes, *supra* note 5; *see, e.g.*, Dugus v. Kansas City S. Ry. Lines, 473 F.2d 821, 827 (5th Cir.) (loss of enjoyment of life is not to be considered as separate element of damage), *reh'g denied*, 414 U.S. 823 (1973); Funston v. United States, 513 F. Supp. 1000, 1010 (M.D. Pa. 1981) (same); Aretz v. United States, 456 F. Supp. 397, 401-02 (S.D. Ga. 1978) (same), *aff'd*, 604 F.2d 417 (5th Cir. 1979); Huff v. Tracy, 57 Cal. App. 3d 939, 943, 129 Cal. Rptr. 551, 553 (1976) (loss of enjoyment of life is element of general damages and may be argued as such); Haynes v. Waterville & Oakland St. Ry., 101 Me. 335, 64 A. 614, 615 (Me. 1906) (same); Kasiski v. Central Power & Light Co., 4 N.J. 130, 132 A. 201, 202 (1926) (same); *Willinger*, 393 A.2d at 1191 (trial jury not to separately consider and award damages for loss of life's pleasures); Blodgett v. Olympic Sav. & Loan Ass'n, 32 Wash. App. 116, 646 P.2d 139, 146 (1982) (jury not to separately consider loss of enjoyment of life as separate element of damages).

[39] Hermes, *supra* note 5. Generally, the argument has been made that loss of enjoyment of life is included in an award for pain and suffering, and a separate award for loss of enjoyment of life would merely duplicate a pain and suffering award. *See Huff*, 57 Cal. App. 3d at 943, 129 Cal. Rptr. at 553 (award of damages for loss of enjoyment of life merely duplicative award for other elements of damage); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985) (same); *Blodgett*, 646 P.2d at 145-46 (same).

[40] Hermes, *supra* note 5.

other damages.[41]

Jurisdictions which have determined that the loss of enjoyment of life is not a separate element of damages generally base their decisions on the rationale that awarding damages for loss of enjoyment of life would impermissibly duplicate another element of damages, such as pain and suffering, or permanent disability.[42] Reaching a similar result, but in a more indirect fashion, are cases that have recognized the enjoyment of life as a separate element of damages in the absence of an award for permanent disability.[43] For example, in *Flannery v. United States*,[44] the Supreme Court of West Virginia went so far as to equate loss of enjoyment of life with a component of permanent disability and therefore allowed a separate recovery for loss of enjoyment of life since there was no other award for permanent disability.[45] Employing the same rationale to reject recovery for loss of enjoyment of life, but in a reverse fashion, the California Supreme Court, in *Huff v. Tracy*,[46] also

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[41] *Id.*

[42] *Id.* at 566. Loss of enjoyment of life is considered an element of permanent disability in some jurisdictions. Flannery v. United States, 297 S.E.2d 433, 438 (W. Va. 1982) (loss of enjoyment of life should be evaluated as part of permanency of plaintiff's injury), *cert. denied*, 467 U.S. 1226 (1984). Other jurisdictions have held that loss of enjoyment of life duplicates pain and suffering. Funston v. United States, 513 F. Supp. 1000, 1010 (M.D. Pa. 1981) (all nonpecuniary losses of plaintiff in personal injury action termed "pain and suffering"). Finally, some jurisdictions have held that loss of enjoyment of life is a component of an award for a disability, specifically the pain and suffering caused by the disability (not being able to do what one used to do). *Huff*, 57 Cal. App. 3d at 944, 129 Cal. Rptr. at 553 ("[a] separate enjoyment-of-life instruction only repeats what is effectively communicated by pain-and-suffering instruction").

[43] Hermes, *supra* note 5, at 579; *see Flannery*, 297 S.E.2d at 438 (holding that no impermissible duplication of damages existed where trial judge did not award separate amounts for permanent disability and loss of enjoyment of life); Mariner v. Marsden, 610 P.2d 6, 7 (Wyo. 1980) (awarding damages for loss of enjoyment of life but none for disability). *Contra* Swiler v. Banker's Supermarket, Inc., 203 Neb. 183, 277 N.W.2d 697, 700 (Neb. 1979) (instructions for permanent disability, pain and suffering, and loss of enjoyment of life not error); McDougald v. Garver, 135 A.D.2d 80, 524 N.Y.S.2d 192, 200 (1988) (damages for permanent disability, pain and suffering, and loss of enjoyment of life awarded). For criticism of *McDougald* and *Swiler*, see Hermes, *supra* note 5, at 585-86; Comment, *supra* note 17, at 345.

[44] 297 S.E.2d 433 (W. Va. 1982). In this case, plaintiff sought to recover for injuries he sustained that left him permanently semi-comatose. *Flannery*, 297 S.E.2d at 434.

[45] *Id.* at 438. The court stated that whether loss of enjoyment of life fits into the damage scheme may be semantical, but logically it should be evaluated as part of the permanency of the plaintiff's injury. *Id.* at 437. In this case, the trial judge did not award separate amounts of damage for both the permanency of the injury and loss of enjoyment of life, but if he had, it would have been an impermissible duplication of damages. *Id.* at 438.

[46] 57 Cal. App. 3d 939, 129 Cal. Rptr. 551 (1976).

equated loss of enjoyment of life with a permanent disability and held that it was judicial error to award damages for both.[47]

Though it may be fortunate, or unfortunate, depending upon an observer's viewpoint, Mississippi has never directly addressed whether loss of enjoyment of life is recoverable, and if so, whether it is a separate element of damage in personal injury cases. Therefore, in the absence of the Mississippi Supreme Court's guidance, it is imperative in determining the validity of loss of enjoyment of life damage awards in Mississippi to analyze the model jury instructions in this state. These instructions provide four elements of damage in personal injury actions:

> (1) The type of injuries to the plaintiff, if any, and the length of their duration;
> (2) Past, present and future physical pain and suffering and resulting mental anguish, if any;
> (3) Reasonable medical expenses incurred and those that are reasonably certain to be incurred in the future, if any;
> (4) Any future disability that is reasonably certain to occur, if any, its duration and its effect, if any, on [the plaintiff's] future [earnings/earning capacity]. In arriving at the amount of your award, if any, for any loss of future [earnings/earning capacity], you should consider what the plaintiff's health, physical ability, age, and earning power or capacity were before the injury and the effect of the plaintiff's injuries, if any, upon them.[48]

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[47] *Huff*, 57 Cal. App. 3d at 944, 129 Cal. Rptr. at 553. In this case, however, the court found the error to be harmless because there was no reasonable probability the error increased the award. *Id.* at 945, 129 Cal. Rptr. at 553.

[48] MISS. MODEL JURY INSTR. 20.14 (1979). The sources for the model jury instructions are: Kinnard v. Martin, 223 So. 2d 300, 303 (Miss. 1969) (jury should consider amount of physical injury, mental and physical pain, present and future and temporary and permanent disability, medical expenses, loss of wages and earning capacity, sex, age and health in determining appropriate amount of damages); Gillis v. Sonier, 187 So. 2d 311, 313 (Miss. 1966) (jury had right to consider lost wages, past and future); Occhipinti v. Rheem Mfg. Co., 252 Miss. 172, 182, 172 So. 2d 186, 190 (1965) (jury allowed to consider physical pain and mental suffering in determining damages); Walters v. Gilbert, 248 Miss. 77, 93, 158 So. 2d 43, 50 (1963) (recovery for loss of earning capacity may be awarded whether temporary or permanent); Grenada Dam Constructors, Inc. v. Patterson, 48 So. 2d 480, 483 (Miss. 1950) (jury may consider loss of earnings, pecuniary expenses, cost of medicine and medical attendance, mental and physical injuries caused by injuries, and future damages for loss of health, time and use of limbs when assessing damage for personal injury claim); Hollinshed v. Yazoo M.V.R.R., 99 Miss. 464, 474-75, 55 So. 40, 41 (1911) (appellant was entitled to compensation for medical bills, loss of

The elements of damages listed above include, if not all, nearly all of the types of hedonic damage that exist for personal injuries. Element four includes *any* disability, its duration, *and* its effect on the plaintiff's income.[49] If the underlying rationale in cases allowing a separate recovery for loss of enjoyment of life is to permit recovery for the nonpecuniary losses within a permanent disability, then this damage is already included in Mississippi's Model Jury Instructions. Hence, when elements two and four are combined, a plaintiff in a personal injury action is afforded the opportunity to recover for any past, present, and future pain and suffering; any resulting mental anguish; and the effect of any future disability on the plaintiff.[50] Of particular importance is that this language provides for *any* effect of the disability on the plaintiff, which should be interpreted to include any loss of enjoyment of life suffered by the plaintiff. Furthermore, if the underlying rationale for permitting a separate recovery for loss of enjoyment of life is to compensate for the pain and suffering of the victim, then, accordingly, this damage is likewise provided for in the elements of damage in a Mississippi personal injury action.

Mississippi case law supports the above elements of damage.[51] For instance, in *Woods v. Nichols*,[52] the Mississippi Supreme Court stated that in personal injury actions, the jury could consider the degree of physical injury; present and future mental and physical pain; temporary and permanent disability; medical expenses; loss of wages and wage-earning capacity; the sex, age, and state of health of the plaintiff; loss of use of limbs; and disfigurement or mutilation of the body.[53] Therefore, as indicated by the combined language of case law and the model jury instructions, it is readily apparent that both the pecuniary and nonpecuniary damages incurred by a plaintiff are thoroughly taken into consideration in Mississippi personal injury actions. Accordingly, any separate loss of enjoyment of life instruction would cause unnecessary confusion without producing a more equitable result, in that such damages are already adequately provided for.

Recently, in *First Trust Co. v. Scheels Hardware*,[54] the supreme

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time, physical and mental suffering, pain, and resulting mental suffering).

[49] MISS. MODEL JURY INSTR. 20.14.

[50] *Id.*

[51] *See supra* note 48.

[52] 416 So. 2d 659 (Miss. 1982).

[53] *Woods*, 416 So. 2d at 671. This court did not purport to create an exhaustive list of allowable damages in personal injury actions, but rather summed up some types of damages that have been allowed in previous cases. *Id.*

[54] 429 N.W.2d 5 (N.D. 1988).

court of a jurisdiction providing for essentially the same elements of damage in personal injury actions addressed the propriety of awarding damages for loss of enjoyment of life.[55] Therein, the Supreme Court of North Dakota, before rendering its opinion, noted the jurisdictional split over whether loss of enjoyment of life should be included as a separate element of damage in personal injury actions.[56] The court thereafter went on to hold that it was appropriate to argue that loss of enjoyment of life was a component of either pain and suffering or permanent disability,[57] but in any event, a separate instruction on loss of enjoyment of life was not necessary.[58] Accordingly, the court determined that an instruction on the four elements of damage adequately informed the jury of the damages recoverable.[59]

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[55] N.D. CENT. CODE § 32-03.2-04 (Supp. 1989). This section provides:

> In any civil action for damages for wrongful death or injury to a person and whether arising out of breach of contract or tort, damages may be awarded by the trier of fact as follows:
>
> 1. Compensation for economic damages, which are damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses.
>
> 2. Compensation for noneconomic damages, which are damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation and other nonpecuniary damage.

Id.

Prior to the enactment of this code section, North Dakota Pattern Jury Instruction-Civil 1120 was in effect. Although the pattern instruction was more like the Mississippi Model Jury Instruction as to form, substantively both North Dakota forms are consistent. Hermes, *supra* note 5, at 563 n.8. The Mississippi Model Jury Instruction and the North Dakota Pattern Jury instruction were almost exactly identical in language. Although the North Dakota statute superseded the pattern instruction, the categories of damage in the pattern instruction and the North Dakota Code are consistent. *Id.* Because of this consistency, the Mississippi Model Jury Instructions should also be consistent with the North Dakota Code. In this writer's opinion, the elements of damage pertaining to personal injury actions in both Mississippi and North Dakota are consistent.

[56] *Scheels Hardware*, 429 N.W.2d at 13. For approaches of various jurisdictions to this issue, see Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R.4th 293, 300-11 (1984).

[57] *Scheels Hardware*, 429 N.W.2d at 13-14. The court noted it would have been appropriate for the plaintiff to argue that loss of enjoyment of life was a component of one of the other types of damage instructed upon, such as "pain, discomfort, mental anguish, or impairment of health, mind or person . . . ." *Id.*

[58] *Id.* at 14.

[59] *Id.* at 13-14. At the time of the case, North Dakota used the four-element form of

Hence, as earlier stated, Mississippi for all practical purposes already adequately allows for recovery of loss of enjoyment of life in personal injury actions through its present elements of damage.[60] Although loss of enjoyment of life is not specifically or expressly recoverable in personal injury actions, the four elements of damage included in jury instructions adequately provide for loss of enjoyment of life through pain and suffering and permanent disability.[61] Thus, as illustrated in the earlier cases set forth herein, in view of Mississippi's present jury instruction, a further instruction on loss of enjoyment of life would impermissibly duplicate those four elements of damage.

III. Loss of Life's Pleasures

As previously discussed, the second type of hedonic damages seeks to afford recovery for the "loss of life's pleasures." This damage is the nonpecuniary value of the deceased's life expectancy to himself.[62] Pertinent herein, this type of damage begins at the death of the deceased.[63] Much like "loss of enjoyment of life," this aspect of hedonic damages has been unable to escape controversy in its application. At the present, there are three controversies swirling around this kind of damage. Considering them in no particular order, the first entails the familiar argument that evidence of this nature is too speculative.[64] The second controversy pertains to whether awarding hedonic damages for loss of life's pleasures will result in excessive verdicts that will serve to

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jury instructions: "(1) compensation for the reasonable value of medical expenses, (2) compensation for the reasonable value of loss of productive time, (3) reasonable compensation for pain, discomfort, and mental anguish, and (4) reasonable compensation for complete or partial permanent disability in health, mind or person." *Id.* at 13.

[60] *See supra* notes 48-50 and accompanying text.

[61] *Id.*

[62] McGowan v. Estate of Wright, 524 So. 2d 308, 312 (Miss. 1988) (Robertson, J., dissenting). This damage includes, at the least, the social and psychological value to life above and beyond pecuniary value. *Id.*

[63] *Id.* at 311-13. There is an argument advanced by some that "loss of life's pleasures" also has applicability in personal injury actions. *See* Marcotte, *supra* note 24 (reporting award of hedonic damages in personal injury action).

[64] Sherrod v. Berry, 629 F. Supp. 159, 164 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988). The court found that an economist's testimony as to the hedonic value of life in a wrongful death action was admissible. *Id.* The court stated that the fact hedonic damages were difficult to measure did not make them speculative. *Id.* The rule against speculative damages pertained to uncertainty as to causation. *Id.* The court noted that hedonic damages had been allowed in England since 1976 and that American economists, legal scholars and social scientists had been attempting to formulate a method by which to estimate the value of human life. *Id.*

impede and undermine the compensatory nature of damages.[65] Finally, the third debatable issue, which is somewhat analogous to the second, deals with whether awarding damages for loss of life's pleasures achieves the goal of our legal system, to make the victim whole.[66]

The criticism that admitting evidence of this nature is too speculative was addressed in the previous section on loss of enjoyment of life.[67] As was noted in that section, the same criticism was made in other areas of nonpecuniary damage, such as pain and suffering and loss of consortium.[68] Today these elements of damage are commonly accepted in our legal system.[69] Accordingly, this criticism can readily be disposed of in the same way that it was dismissed in that section of this comment.[70]

More importantly, the second controversial issue, dealing with excessive verdicts, is much more complicated than the first issue and requires a more detailed analysis. The foremost problem confronting the excessive verdicts argument is the implied assumption that excessive verdicts will result if juries are instructed on the recoverability of hedonic damages. The decision in *Sherrod v. Berry*[71] clearly dispels this fear. In *Sherrod*, the expert witness testified that the hedonic value of plaintiff's life ranged from $1.2 million to $12 million.[72] Unpersuaded by the expert's excessive figures, the jury exercised admirable restraint and awarded a sum of $850,000 as the value of the plaintiff's life.[73]

Similarly, as was the case in *Sherrod*, most of the courts that have

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[65] Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 393 A.2d 1188, 1190-91 (1988). The court stated that in Pennsylvania, recovery for the loss of life's amenities could be recovered only if the victim survived. *Id.* at 1190. To hold otherwise would go against the compensatory nature of damages in tort actions. *Id.* The court went on to say that loss of life itself was not compensable and it saw "little or no distinction between seeking to calculate the value of 'life itself' and the value of experiencing life's pleasures." *Id.* at 1191.

[66] *Sherrod*, 629 F. Supp. at 163. The court stated that "the loss of life means more than being deprived of the right to exist or of the ability to earn a living; it includes deprivation of the pleasures of life." *Id.*

[67] *See supra* notes 26-37 and accompanying text.

[68] *See supra* note 32 and accompanying text.

[69] *Id.*

[70] *See supra* notes 33-37 and accompanying text.

[71] 629 F. Supp. 159, 160 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988); *see* Comment, *supra* note 21, at 335; *supra* notes 33-36 and accompanying text.

[72] *Sherrod*, 629 F. Supp. at 163. The expert witness testified there was a relationship somewhere in the dimension of three times up to 30 times their economic productive income. *Id.*

[73] *Id.* at 160.

allowed recovery of hedonic damages report that in awarding such damages, juries awarded damages which fell far short of economists' estimates, with awards ranging from $100,000 to $850,000.[74] This illustrates the restraint of the courts and juries in awarding hedonic damages.

However, the fact that jurors have demonstrated restraint in evaluating and awarding hedonic damage awards does not totally dispose of the excessive verdicts argument. Proponents of this argument also allege that, despite such restraint, an award for the loss of life's pleasure will result in an inequitable windfall to the estate of the deceased and its beneficiaries because the decedent will never benefit from such an award. This windfall, in turn, might undermine the compensatory nature of damages.[75] This criticism was espoused in *Willinger v. Mercy Catholic Medical Center*,[76] where the Supreme Court of Pennsylvania stated, "Compensation for the loss of life's amenities is recoverable only if the victim survives the accident . . . ."[77] The *Willinger* court further held that if the rule were different, it would contradict the compensatory nature of awards, and that it was error for a jury to consider damages for loss of life's pleasures.[78] Hedonic damages have been praised as a method of justly compensating a decedent's estate.[79] Since the role of the estate is to collect damages for the deceased,[80] and hedonic damages compensate the deceased for loss of life's pleasure, then theoretically the purpose of the estate is fulfilled by collecting these damages, and the windfall to the beneficiaries is irrelevant.[81]

In light of the above analysis, considering the restraint that juries

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[74] Comment, *supra* note 21, at 343.

[75] *Id.* at 337. The United States Court of Appeals for the Fourth Circuit reviewed a $1,300,000 lower court damage award for a comatose plaintiff's "loss of the ability to enjoy life." Flannery v. United States, 718 F.2d 108, 110 (4th Cir. 1983). The court refused to allow recovery of these damages, contending that the plaintiff would never be able to enjoy the benefit of these damages and upon his death, the award would create a windfall to the plaintiff's estate. *Id.* at 111.

[76] 393 A.2d 1188 (Pa. 1988).

[77] *Willinger*, 393 A.2d at 1190.

[78] *Id.* Someone who has a permanent disability suffers the pain of that disability every day, whereas when one dies, there is no pain from the disability. *Id.* at 1191. "Unless we are to equate loss of life's pleasures with loss of life itself (which the court did not), we must view it as something that is compensable only for a living plaintiff who has suffered from that loss." *Id.*

[79] Comment, *supra* note 21, at 337-38; *see* Waldron v. Raccio, 166 Conn. 608, 353 A.2d 770, 774-75 (1974) (holding that decedent's estate is entitled to compensation for decedent's loss of ability to enjoy life's activities).

[80] Comment, *supra* note 21, at 337-38.

[81] *Id.*

and courts have shown in past cases, and the fact that estates play their proper role by collecting hedonic damages for the deceased, the excessive verdicts issue should be resolved in favor of awarding hedonic damages. However, one should not proceed with too much haste in filing suit with the expectation that damages for the "loss of life's pleasures" will be easily recoverable. As noted in the earlier textual discussion, there are *three* controversies surrounding this type of hedonic damage award. It is this third and final controversial issue which poses the largest obstacle to recovery.

As alluded to above, the third issue to be resolved in determining the appropriateness of a hedonic damage award in this context pertains to whether such damages will achieve the goal of our legal system, that is, to make a plaintiff whole.[82] After closely analyzing the matter, it is the writer's contention and belief that this is where the argument for awarding hedonic damages fails. Compensatory damages are designed to put a plaintiff in the same position he would have been in had the injury not occurred.[83] Damages for loss of life's pleasures simply do not achieve this goal. Although in theory a recovery by the estate would be appropriate, awarding an estate damages for loss of life's pleasures is in reality only increasing the value of the decedent's estate. The deceased is not made more whole, nor will he ever derive a benefit from such award. This is the natural effect of the fact that there is simply no way in our legal system to render a plaintiff in a wrongful death action whole. With regard to what the value of the decedent's estate would have been had the deceased lived, the best estimate is obtained by measuring the decedent's pecuniary value at the time death occurs. A measure in accord with this procedure will produce damages which are already awarded in the pecuniary aspect of damages for wrongful death.[84] Accordingly, an award for loss of life's pleasures makes neither the deceased nor his estate whole and therefore does not achieve the goal of our legal system to make the plaintiff whole.[85]

In Mississippi, several actions can be brought for wrongful death under section 11-7-13 of the Mississippi Code.[86] The key question is

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[82] 1 DAMAGES IN TORT ACTIONS, *supra* note 7.

[83] *Id.* The purpose of compensatory damages is to fully compensate the injured party for actual damages. *Id.* at 1-12. Thus, compensatory damages generally only entitle the injured party to reimbursement. *Id.* at 1-9.

[84] MISS. MODEL JURY INSTR. 20.18. Element two of the instruction provides for "the present net cash value, at the time of the death, of [decedent]'s life expectancy." *Id.*

[85] *See supra* note 7 and accompanying text.

[86] MISS. CODE ANN. § 11-7-13 (Supp. 1989). It provides:

whether the personal representative of the decedent may bring an action for loss of the estate's assets. Such a representative may bring such a suit under sections 91-7-231[87] and 91-7-233.[88]

Whenever the death of any person shall be caused by any real, wrongful or negligent act or omission . . . as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof . . . and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned . . . . In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

. . . .

In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not. Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided . . . .

Id.

[87] MISS. CODE ANN. § 91-7-231 (1972). This section provides:

An executor, administrator, or temporary administrator may maintain any action or suit which shall accrue to him in the due course of administration, on any contract which he is authorized to make as such, or for the recovery of personal property, or for injuries thereto.

Id.

[88] MISS. CODE ANN. § 91-7-233 (1972). This section states:

Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. They shall also be

The judicial construction afforded the Mississippi wrongful death statute has allowed the estate to recover only very limited and specific damages.[89] These include funeral expenses,[90] tombstone costs,[91] real and personal property damage,[92] medical expenses,[93] and administrative costs of the deceased's estate.[94] However, recovery of damages such as these is not unlimited, as any amount awarded to the decedent's estate is subject to the claims of the creditors of the estate.[95]

These elements of damage for the estate, which have been fairly rigid throughout the years, were challenged in *McGowan v. Estate of Wright*.[96] In that case, an action was brought by Lucille McGowan, widow of the deceased, and by A.J. Reese, administrator of the estate of decedent John McGowan, against the estate of Ruby Wright.[97] The jury returned a verdict of $1,959.50, the exact amount of the funeral expenses and the ambulance fee.[98] The plaintiffs appealed the verdict, contending that there must be some value for the decedent's remaining

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liable to be sued in any court in any personal action which might have been maintained against the deceased.

Id.

[89] *See* Comment, *Damages Recoverable in Mississippi for the Wrongful Death of an Adult*, 53 MISS. L.J. 637, 640 (1983) (outlining damages recoverable by estate in Mississippi). Mississippi's model jury instructions provide for all damages recoverable in wrongful death actions. MISS. MODEL JURY INSTR. 20.18. They provide for:

1. The loss of the society and companionship of [deceased] to [his/her] survivors;
2. The present net cash value, at the time of death, of [deceased]'s life expectancy;
3. Pain and suffering endured by the deceased, prior to [his/her] death;
4. Any reasonable medical expenses incurred by [representative];
5. Reasonable funeral expenses incurred by the estate of the deceased;
6. Any damage to personal property owned by the deceased.

Id.

[90] Thornton v. Insurance Co. of N. Am., 287 So. 2d 262, 266-67 (Miss. 1973); *see* Scott v. K-B Photo Serv., 260 So. 2d 842, 844 (Miss. 1972) (funeral expenses owed by estate are recoverable).

[91] *Thornton*, 287 So. 2d at 265.

[92] *Id.*

[93] *Id.*; *see* Comment, *supra* note 89, at 640.

[94] *Thornton*, 287 So. 2d at 265.

[95] *Id.* at 266-67.

[96] 524 So. 2d 308 (Miss. 1988).

[97] *McGowan*, 524 So. 2d at 309.

[98] *Id.* There was only one correspondence between Mr. and Mrs. McGowan since 1946, a Christmas card in 1981. *Id.* at 310. Mr. McGowan was 67-years old with a life expectancy of 13.6 years. *Id.* He cohabitated with Ruby Wright, defendant's decedent, for 15 years prior to their deaths in the car accident in which Ms. Wright was driving. *Id.* at 311.

life expectancy.[99] The Mississippi Supreme Court affirmed the jury's verdict and denied the plaintiff's petition for a rehearing.[100] Justices Robertson, Hawkins, and Sullivan dissented from the decision not to grant a rehearing.[101] The dissent, authored by Justice Robertson, began with a short history of the Mississippi wrongful death statute and its judicial interpretation.[102] It then adopted the plaintiff's view that there is an intrinsic value of life that should be compensated and stated that the Mississippi Supreme Court had read the wrongful death statute too narrowly because it "implicitly assumes that the average person derives no utility from living."[103] Finally, the dissent concluded by stating, "Indeed, the more thought one gives the matter, the more anomalous if not bizarre becomes the suggestion that wrongful death damages do not include the nonpecuniary utility to the deceased of his life expectancy."[104] Language such as that prescribed by the dissent in *McGowan* clearly establishes that the dissenting justices would be receptive to nonpecuniary damages for the utility of the decedent's life expectancy to himself, that is, loss of life's pleasures.

Conclusion

There are two types of hedonic damages: loss of enjoyment of life and loss of life's pleasures.[105] Because the present elements of damage in Mississippi personal injury actions provide for permanent disability and any effect such disability has on the plaintiff, as well as pain and suffering, Mississippi already allows for loss of enjoyment of life through its present elements of damage.[106] Although in some jurisdictions loss of enjoyment of life may not duplicate another element of damage,[107] an award of damages for loss of enjoyment of life in Mississippi would impermissibly duplicate other elements of damage and allow a plaintiff double recovery.[108]

With regard to the other form of hedonic damages, loss of life's pleasures, the Mississippi Supreme Court has not affirmatively decided

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[99] *Id.* at 311.

[100] *Id.*

[101] *Id.* Justices Lee and Griffin agreed with the dissent, but believed it did not apply in this case. *Id.* at 313.

[102] *Id.* at 312.

[103] *Id.*

[104] *Id.* at 313; *see supra* text accompanying note 22.

[105] *See supra* notes 17-21 and accompanying text.

[106] *See supra* notes 42-61 and accompanying text.

[107] *See supra* note 2 and accompanying text.

[108] *See supra* notes 60-62 and accompanying text.

whether this is recoverable under the present version of Mississippi's wrongful death statute.[109] Although the wrongful death statute in Mississippi provides for recovery of any and all damages,[110] it is imperative to decide if an award for loss of life's pleasures would fulfill the purpose of our legal system.[111] In this case, it would not.[112] The purpose of our legal system is to make the plaintiff whole by putting him in the same position he would have been in had the injury not occurred.[113] Compensation for loss of life's pleasures does not accomplish this purpose and therefore would violate the underlying policy of our legal system.[114]

James Brady

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[109] *See supra* notes 92-100 and accompanying text.
[110] *See supra* notes 82-91 and accompanying text.
[111] *See supra* note 79.
[112] *See supra* notes 79-81 and accompanying text.
[113] *See supra* note 79.
[114] *See supra* notes 79-81 and accompanying text.

PERPETUATING THE RULE OF CONFUSION: MISSISSIPPI'S REFORM OF THE RULE AGAINST PERPETUITIES

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV.
Oliver Wendell Holmes[1]

Introduction

Since its emergence in *The Duke of Norfolk's Case*[2] in 1682, the

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[1] O.W. Holmes, *The Path of the Law*, in Collected Legal Papers 187 (1920).

[2] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682). The underlying facts in the case are recounted in Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. Pa. L. Rev. 19 (1977). Henry Frederick Howard, the Earl of Arundel and Surrey, was faced with a problem: Thomas, his eldest son, and therefore successor to the earldom by law, was insane. *Id.* at 19. In order to provide adequately for Henry, his second eldest, who by the time of the litigation was the Duke of Norfolk, the Earl created the disputed trust; by its terms Henry was to have the income of the barony of Grostock as long as Thomas or male heirs of his body existed. *Id.* In order to provide for the other sons adequately, the trust instrument further stipulated that if Thomas should die without issue, thereby placing the earldom in Henry, the third eldest son, Charles, would be entitled to the profits of the barony, and so on through the succession of sons. *Id.* The dispute centered over the validity of Charles' contingent interest in the trust profits. The Duke of Norfolk's Case, 3 Ch. Cas. at 16, 22 Eng. Rep. at 943. This springing executory interest, *id.* at 20, 22, Eng. Rep. at 943, was held to be void by the Lord Chancellor Nottingham, *id.* at 53, 22 Eng. Rep. at 962, whose decision was ultimately upheld by the House of Lords, thus establishing the Rule Against Perpetuities. *Id.* at 54, 22 Eng. Rep. at 963.

Theories concerning the underlying societal and political pressures resulting in the decision vary and are cogently discussed in Haskins, *supra*, at 19-46. Some commentators have interpreted the ruling as a victory for the rising merchant classes as they struggled to gain power from the holdovers of feudal authority, while others have suggested that the Rule actually favored the old landed classes by making it easier for them to transfer their property and in practical terms giving them greater control over the disposition of their property. *Id.*

That the case was of great moment both politically and legally seems to have been recognized by the Lord Chancellor, the Earl of Nottingham, who secured advisory opinions from the three chief judges of the common-law courts. *Id.* at 38. The state of confusion surrounding the perpetuities law at the time is demonstrated by the fact that none of the judges agreed with the Lord Chancellor, and in their opinions all offered somewhat different analyses. *See* The Duke of Norfolk's Case, 3 Ch. Cas. at 14, 22 Eng. Rep. at 939 (opinion by Lord Chief Baron Montague); *id.* at 20, 22 Eng. Rep. at 943 (opinion

Rule Against Perpetuities (Rule) has stood ready to confound those unfamiliar with its complexities. The modern response to this confusion has been a search for a more simplified perpetuities restriction. Though all jurisdictions within the United States recognize some form of perpetuities limitation, many have subjected the common-law Rule to legislative or judicial modification.[3] Mississippi has not been an exception to this trend; judicial decisions within the last thirty years have established significant changes in the state's perpetuities law.[4] Yet these changes have given rise to complexities of their own, and "simplification" in the perpetuities area has arguably led to more confusion than that which existed under the common-law Rule. This paper will examine Mississippi's modification of the common-law Rule and the uncertainty created by these changes. Part I examines the adoption of the wait-and-see doctrine and equitable approximation; the Mississippi Supreme Court's latest perpetuities decision, *In re Estate of Anderson*,[5] is also analyzed. Part II then considers perpetuities issues left unresolved by recent Mississippi developments and offers suggestions as to future steps necessary to achieve a simpler perpetuities restriction.

I. Mississippi's Modification of the Common-Law Rule

The Rule Against Perpetuities applies to certain interests in property[6] and provides a time period beyond which such interests may not

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by Lord Chief Justice North); *id.* at 23, 22 Eng. Rep. at 944 (opinion by Lord Chief Justice Pemberton).

[3] *See* 5A R. Powell, Powell on Real Property ¶ 827B-F (5th ed. 1988) (discussing various judicial and legislative modifications to common-law Rule adopted in different states).

Powell notes that there has been a renewed interest in the Rule, with most state legislatures taking some kind of legal action. *Id.* Some states have abandoned past attempts to alter the common-law Rule and have by statute returned to the common-law principles. *Id.*; *see also* Ind. Code Ann. § 32-1-4-1 (Burns 1980) (reestablishing common-law Rule). Other state legislatures have enacted wait-and-see statutes. 5A R. Powell, *supra*, ¶ 827B; *see also* Pa. Stat. Ann. tit. 20, § 6104 (Purdon 1975) (wait-and-see statute). A third group of states have adopted cy pres statutes. 5A R. Powell, *supra*, ¶ 827C; *see also* Ky. Rev. Stat. Ann. § § 216, 381 (Baldwin 1989). Mississippi is in a minority of three states which has altered the Rule through judicial decision. 5A R. Powell, *supra*, ¶ 827A.

[4] *See, e.g.*, C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 530 (Miss. 1988) (shifting from what-might-happen to wait-and-see); Carter v. Berry, 243 Miss. 321, 362-64, 140 So. 2d 843, 848-50 (1962) (abolishing all-or-nothing rule).

[5] 541 So. 2d 423 (Miss. 1989).

[6] The Rule applies to certain types of equitable interests in real or personal property. L. Simes & A. Smith, The Law of Future Interests § 1235 (2d ed. 1956); *see also*

remain contingent.[7] The classic statement of the Rule provides: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[8]

In the application of the common-law Rule, two aspects of its operation are of particular importance. The first concerns the "possibilities" aspect of its application. The Rule does not require that an interest be absolutely certain to vest within the period of the Rule.[9] It does

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Thomas v. Thomas, 97 Miss. 697, 700, 53 So. 630, 632 (1910) (noting Rule applies to interests in both realty and personalty). Thus the following interests are recognized as being subject to the limitations of the Rule: contingent remainders, Ryan v. Beshk, 339 Ill. 45, 48, 170 N.E. 669, 702 (1930); L. Simes & A. Smith, *supra*, § 1237; executory interests, Gray v. Bridgforth, 33 Miss. 312, 321 (1857); L. Simes & A. Smith, *supra*, § 1236; options to purchase, C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 528 (Miss. 1988); Pace v. Culpepper, 347 So. 2d 1313, 1316-17 (Miss. 1977); L. Simes & A. Smith, *supra*, § 1244; powers of appointment, Burlington County Trust Co. v Di Castel-Cicala, 2 N.J. 214, 66 A.2d 164, 166-67 (1949); L. Simes & A. Smith, *supra*, § 1271; and interests created by the exercise of powers of appointment, *id.* § 1274.

The Rule does not apply to a possibility of reverter following a fee simple determinable estate. Columbus & Greenville Ry. v. City of Greenwood, 390 So. 2d 588, 591 (Miss. 1980); City of Laurel v. Powers, 366 So. 2d 1079, 1082-83 (Miss. 1979). Nor does it apply to a right of entry following an estate in fee simple subject to condition subsequent. Owsley v. Harrison, 190 Ill. 235, 236, 60 N.E. 89, 90-91 (1901); L. Simes & A. Smith, *supra*, § 1238. Vested remainders are also exempt from operation of the Rule. *Id.* § 1235. Finally, the Rule does not apply to reversions created in the grantor or his heirs. Jones v. Burns, 221 Miss. 833, 841, 74 So. 2d 866, 868 (1954); L. Simes & A. Smith, *supra*, § 1240.

[7] L. Simes & A. Smith, *supra* note 6, § 1228. Although somewhat ambiguous, the terms "contingent" and "vested" are traditionally employed by courts when considering perpetuities problems. *Id.* § 571. An interest is deemed contingent when it is created in a manner that conditions the right to possession or enjoyment upon some occurrence other than, or in addition to, the orderly termination of the preceding estate. *Id.* Conversely, an interest is considered vested when the right to possession or enjoyment is subject to no condition precedent other than the orderly termination of the prior estate. *Id.* Vesting does not require that there be an absolute right to immediate possession. Anderson v. Davis, 541 So. 2d 423, 429 (Miss. 1989). The interest will be considered vested if there is a present right to future possession, even if that present right is subject to divestment by some future event that may or is certain to happen. Hayes v. Cole, 221 Miss. 459, 471, 73 So. 2d 258, 263 (1954); *see also* Bridgforth v. Gray, 222 So. 2d 670, 672 (Miss. 1969) (noting that vested interest subject to complete divestment is not within scope of Rule).

In the context of a vested-vs.-contingent classification, executory interests represent an anomaly to the general rules. By definition, executory interests are never considered vested. L. Simes & A. Smith, *supra* note 6, § 1236. However, it is possible to have a noncontingent executory interest, such as a gift to B "from and after twenty-five years of the delivery of the deed." *Id.* Nevertheless, such interests are subject to the Rule just as truly contingent interests are. *Id.*

[8] J. Gray, The Rule Against Perpetuities 191 (4th ed. 1942).

[9] L. Simes & A. Smith, *supra* note 6, § 1228. In application of the Rule, the relevant

require, however, that it be possible for the interest to vest, if it will vest, only within the period of the Rule; if there is any possibility that the interest may vest outside of the period of the Rule, the interest is void for remoteness.[10] In determining whether the interest may vest too remotely, the Rule considers only the facts existing at the time of the interest's creation.[11] If it is possible under the facts existing at the creation of the interest that the interest could vest beyond the period allowed by the Rule, the interest is invalid.[12] The same result is reached even though the interest may in fact subsequently vest within the period of the Rule.[13] The second important aspect of the common-law Rule concerns the effect of a finding of invalidity; any interest found to be void is completely stricken from the scheme of disposition and does not transfer any interest in property.[14] The common-law Rule

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determination is not whether an interest is certain to vest within the period, but whether it must necessarily vest within the period if vesting does in fact occur. *Id.*

[10] *Id.* It is this possibilities aspect that has earned the Rule its reputation as a trap for the unwary draftsman. "Many perfectly reasonable dispositions are stricken down because on some outside chance not foreseen by the testator or his lawyer it is mathematically possible that the vesting might occur too remotely." Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643 (1938); *see also id.* at 643-45 (noting fertile octogenarian, unborn widow and administrative contingency examples and suggesting drafting language to avoid such problems).

[11] L. SIMES & A. SMITH, *supra* note 6, § 1226. When interests are created by will, the period of the Rule runs from the date of the testator's death. Safe Deposit & Trust Co. v. Sheehan, 169 Md. 93, 98, 179 A. 536, 541-42 (1935); L. SIMES & A. SMITH, *supra* note 6, § 1226. The period runs from the date of delivery where interests are created by deed. Clarke v. Clarke, 121 Tex. 165, 169, 46 S.W.2d 658, 662 (1932); L. SIMES & A. SMITH, *supra* note 6, § 1226.

When the Rule is applied to interests created by the exercise of a power of appointment, the time from which the period of the Rule is deemed to run depends upon the type of power by which the interest was created. L. SIMES & A. SMITH, *supra* note 6, § 1274. If the interest was created by the exercise of a general power presently exercisable, the period of the Rule is measured from the time at which the power was exercised. *Id.*; *see also* Appeal of Mifflin, 121 Pa. 205, 208, 15 A. 525, 528 (1888) (discussing effect of general power). The period is measured from the time at which the power was established if the interest was created under a special power or a general power that could be exercised only by will. L. SIMES & A. SMITH, *supra* note 6, §§ 1274-75; *see also* Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461, 463 (1920) (noting that validity of appointment made under special power is determined by period of time measured from creation of special power).

[12] L. SIMES & A. SMITH, *supra* note 6, § 1228.

[13] *Id.*

[14] *Id.* § 1256. Because the Rule attacks not only the contingency on which an interest is based, but also the interest itself, the effect of a finding that an interest could vest too remotely is that the interest is void *ab initio*. *Id.*

The invalidity of an interest may also affect the validity of other interests contained

does not provide for the partial validation of an otherwise invalid interest; the offending provisions of an interest may not be stricken while effect is simultaneously given to those parts of the interest valid under the Rule.[15]

Together, these two aspects represent those areas most drastically affected by Mississippi's modification of the common-law Rule.

A. The Wait-and-See Doctrine

Mississippi has modified the common-law Rule in a limited category of cases by adopting the wait-and-see doctrine. Wait-and-see in effect substitutes an actualities test for the possibilities aspects of the common-law Rule.[16] Under wait-and-see, the court may look at actual events as they develop after the creation of the interest; if the interest actually vests within the period of the Rule, it is valid despite the fact that at the creation of the interest the possibility existed that it could vest too remotely.[17]

Mississippi judicially adopted the wait-and-see doctrine in *Phelps v. Shropshire*.[18] In *Phelps*, the testatrix died in 1958, leaving a will

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within the same scheme of disposition. *Id.* § 1262. Under the doctrine of infectious invalidity, otherwise valid interests may be declared void where they are so closely connected to an interest void under the Rule that it is considered more equitable to invalidate the interests as a whole rather than to allow the scheme of disposition to be upheld only in part. *Id.* Intent of the testator, as gleaned from reflection on the testamentary disposition as a whole, is the determinative factor in application of this doctrine. *Id.* As the Mississippi Supreme Court has noted, "It should be determined whether the total plan of testator and the portion which is invalid are so integral and related to one another that it can be inferred that testator would have preferred all to fail, rather than to have the valid part stand alone." Carter v. Berry, 243 Miss. 321, 369, 140 So. 2d 843, 852 (1962).

[15] L. Simes & A. Smith, *supra* note 6, § 1256.

[16] While the wait-and-see doctrine does alter the test for validity under the Rule, it does not effect the status of interests found to be valid under the common-law approach. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 564, 572 (1986). Wait-and-see does not alter the validating power of the common-law Rule, so that interests valid at common-law remain valid under the wait-and-see approach. *Id.* Wait-and-see does, however, alter the invalidating power of the common-law Rule. *Id.* Thus, wait-and-see is applied only to those interests that would be held void under the common-law approach. *Id.*

[17] *Id.* Wait-and-see does not validate all interests that would be void under the common-law Rule. *Id.* Rather, it simply prevents such interests from being rendered initially invalid and gives them a second chance to vest within the waiting period of the Rule. *Id.* If they remain nonvested at the end of the waiting period, the interests are declared void. *Id.*

[18] 254 Miss. 777, 183 So. 2d 158 (1966).

that established a trust for the benefit of her nieces and nephews as well as two charities.[19] The will further provided that, should the charities ever determine their interests in the trust to be more of a liability than an asset, all property held in the trust should be sold, "giving the family the chance to buy it in."[20] In 1964, the administrator of the testatrix's estate petitioned the court for construction of the will; in their answers to the petition, the two charities declined their interests in the trust.[21] Subsequently, the trial court held the provision as to the family's option to purchase void under the common-law Rule.[22] On appeal, the Mississippi Supreme Court reversed, holding that an interest conditioned upon a remote invalidating contingency is still valid where that contingency actually occurs within the period of the Rule.[23] Since the contingency of the two charities' declining their interests in the trust actually occurred within the period of the Rule, the family's option to purchase was valid.[24]

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[19] *Phelps*, 254 Miss. at 781, 783, 183 So. 2d at 159, 161.

[20] *Id.* at 784, 183 So. 2d at 161. The testatrix's will alternately provided that if the trust failed after it had been in existence for at least 200 years because the charitable beneficiaries of the trust were no longer in existence, all property in the trust was to revert to the eldest descendent of the testatrix's parents then living. *Id.* at 783-84, 183 So. 2d at 161. Because this contingency did not occur, the court did not consider whether the gift over to the eldest living descendent violated the Rule. *Id.* at 784, 183 So. 2d at 161.

[21] *Id.* at 781-83, 183 So. 2d at 160.

[22] *Id.* at 782, 183 So. 2d at 160.

[23] *Id.* at 785, 183 So. 2d at 161-62; *see also* Henderson v. Millis, 373 N.W.2d 497, 505 (Iowa 1985) (applying IOWA CODE ANN. § 558,68 (West Supp. 1989)).

[24] *Phelps*, 254 Miss. at 785, 183 So. 2d at 162. Stating that "[t]here is no precedent in this State which compels us to close our eyes to facts occurring after the death of the testatrix," the court asserted that adoption of wait-and-see had "the effect of avoiding the punitive and technical aspects of the rule, but at the same time confirming its policy and purpose with reasonable limits." *Id.*

The court likened its adoption of wait-and-see to the rule of construction traditionally applied where an interest was conditioned upon alternative contingencies, one of which made the interest valid under the common-law Rule and the other which made it invalid. *Id.* The court stated that in the case of alternative contingencies, "the gift is held valid *if the first contingency occurs*, although it is invalid *if the second contingency occurs*." *Id.* (emphasis added). This is an incorrect statement of the rule of alternative contingencies. Where a gift is made upon alternative contingencies, it is treated as two separate interests for purposes of the Rule, and the interest conditioned upon the first contingency may be held valid while the second contingency is struck out. L. SIMES & A. SMITH, *supra* note 5, § 1257; *see* Safe Deposit & Trust Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935) (discussing English common-law origins of rule of alternative contingencies). The rule of alternative contingencies does not depend upon the actual occurrence of those contingencies for its application, nor does the occurrence of the contingencies establish the validity or invalidity of the interest. *See infra* notes 39-42 and accompany-

In a later opportunity to rule in the perpetuities area, the court indicated that wait-and-see might be a modification of limited application. *Pace v. Culpepper*[25] involved an unrestricted option to purchase realty that had been entered into by the defendants and plaintiffs' predecessor in interest.[26] The option could be exercised by the defendants if the plaintiffs ever attempted to sell the land.[27] In an action filed to set aside the option, the trial court held the option void as a violation of the Rule.[28] In affirming the trial court's ruling, the supreme court noted that the option created an equitable interest[29] in the defendants that was unlimited as to time or duration.[30] Because of its unrestricted nature, the option had the possibility of vesting beyond the period of the Rule and was therefore void.[31] Significantly, the court

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ing text (discussing C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 528 (Miss. 1977)). The *Phelps* court's misreading of the law of alternative contingencies to include a dependence upon the occurrence or nonoccurrence of the contingency may have been an early signal of the significance the court would place on the occurrence of the contingency in later wait-and-see cases. *Id.*; *see also* Merchant's Nat'l Bank v. Curtis, 98 N.H. 225, 228, 97 A.2d 207, 211 (1953) (discussing general rule of alternative contingencies).

[25] 347 So. 2d 1313 (Miss. 1977).

[26] *Pace*, 347 So. 2d at 1314-15. In 1970, Mr. and Mrs. C.B. Walker conveyed a piece of land to defendants. *Id.* at 1314. On the same date, the parties to the conveyance signed an option-to-purchase agreement giving the defendants a first option to purchase additional land adjoining the land conveyed. *Id.* at 1315. Following the death of his wife in 1973, Mr. Walker conveyed the land subject to the option to his daughter, who in turn conveyed a one-half interest to her brother. *Id.*

[27] *Id.* at 1315 n.1. The option agreement provided that it was binding on the Walkers, "their heirs, executors, administrators and/or assigns." *Id.* The right to exercise the option would be activated if "the Parties of the First Part," *id.*, ever desired to sell the land, *id.* While the defendants did not raise the issue of whether the conveyance from Walker to his daughter activated the right to exercise the option, it is obvious from the language contained in the agreement that all transfers of the property would not activate the option and that a gift of the property, such as that presumably made by Walker to his daughter, would not establish that the contingency on which the option was conditioned had in fact occurred.

[28] *Id.* at 1315.

[29] *Id.* at 1317. The court noted that an option-to-purchase agreement was specifically enforceable, thus giving the optionee an equitable interest in the subject land. *Id.*

[30] *Id.* at 1317-18. The court noted that the unlimited duration of the option was in part established by express language in the agreement providing that the right to purchase extended not only to the defendants, but also to the defendants' heirs, executors, administrators, or assigns. *Id.* at 1316. For an analysis indicating that a restriction excluding heirs or assigns from the right to purchase may save an option from violating the Rule, see Hughes v. Miller, 384 So. 2d 608, 610 (Miss. 1980).

[31] *Pace*, 347 So. 2d at 1318. Defendants had argued that, as an alternative to declaring the total option void under the Rule, the court should apply equitable approximation and invalidate only that portion of the option that would extend beyond the lives of the

failed to mention the *Phelps* decision and its adoption of the wait-and-see doctrine; proceeding on the basis that the contingency on which the *Pace* option was conditioned could possibly occur beyond the period of the Rule, the court applied the common-law Rule in complete disregard of *Phelps*' adoption of the actualities test embodied in wait-and-see.[32]

The seemingly inconsistent holdings of *Phelps* and *Pace* were reconciled in the court's later consideration of *C & D Investment Co. v. Gulf Transport Co.*[33] In 1972, the parties had entered into an agreement whereby Gulf agreed to convey a strip of land to C & D Investment if Gulf ever disposed of another parcel of land specified in the agreement.[34] That parcel of land was conveyed by Gulf in 1983,[35] and C & D Investment thereafter filed suit for specific performance of the agreement between the parties.[36] In sustaining Gulf's motion to dismiss the complaint, the trial court declared the agreement void under the Rule.[37] On appeal, the Mississippi Supreme Court reversed, holding that an interest is not void under the wait-and-see modification to the common-law Rule where the contingency on which such an interest is conditioned has actually occurred within the period of the Rule.[38] In discussing Mississippi's adoption of the wait-and-see doctrine, the court attempted to reconcile the *Pace* and *Phelps* decisions.[39] Noting

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Walkers. *Id.* The court noted that equitable approximation had been applied in Mississippi to trusts and wills but was not applicable to options. *Id.* The court stated, "In trusts and wills there is a vesting of property and the rule is applied to vary the details of administration to preserve the trust and to carry out the intention of the donor or testator, whereas in an option there is no vesting of property." *Id.* This language seems to contradict the court's earlier statement that an option gives an optionee an equitable interest in the land. *See id.* at 1317 (noting that options are subject to Rule because of existence of specifically enforceable equitable interest in optionee). Thus the distinction that the court attempts to draw between a vesting of property and an equitable interest in land seems tenuous at best.

[32] *See id.* at 1318 (court's holding based on possibility that interest may not vest within period of Rule).

[33] 526 So. 2d 526 (Miss. 1988).

[34] *C & D Inv. Co.*, 526 So. 2d at 527.

[35] *Id.* at 528. The agreement between the parties stated that the option would be exercised if Gulf disposed of the parcel of land. *Id.* at 527. Thus, there was no dispute as to whether the option had been activated as there possibly could have been in *Pace*. *See supra* note 27.

[36] *C & D Inv. Co.*, 526 So. 2d at 528.

[37] *Id.*

[38] *Id.* at 530.

[39] *Id.* at 529. Gulf had argued that Mississippi did not apply wait-and-see, noting that *Pace* failed to cite *Phelps* or its application of the wait-and-see modification. *Id.*

that the contingency upon which the *Pace* interest was conditioned had not occurred as of the time of trial,[40] the court held that this factor prevented application of wait-and-see in that decision.[41] Where the contingency had occurred as of the time of trial, as in *Phelps* and *C & D Investment Co.*, application of the doctrine was proper.[42]

B. Equitable Approximation

The common-law approach to the Rule requires void interests to be completely stricken from the scheme of disposition; no provision is made for striking out the offending terms of an interest while concurrently giving effect to those parts of the interest that do fall within the confines of the Rule.[43] The doctrine of cy pres,[44] or equitable approxi-

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[40] *Id.*

[41] *Id.* The court noted that "in *Pace* the contingency had not actually occurred. The suit was brought by the Culpeppers while they were still in possession to have the Paces' future interest declared void. Therefore the wait and see doctrine has no applicability to the *Pace* case." *Id.*

[42] *Id.* In support of its assertion that Mississippi recognized the wait-and-see doctrine and in an attempt to distinguish the failure to apply that doctrine in *Pace*, the court noted *Phelps*' reference to the rule of alternative contingencies. *Id.* The court failed to recognize that *Phelps* had misstated that rule by conditioning its application upon the occurrence of the contingency. *See supra* note 24 (discussing *Phelps* and its erroneous language on rule of contingencies).

[43] *See supra* notes 14-15 and accompanying text (discussing common law).

[44] Cy pres literally means "as near as (possible)." BLACK'S LAW DICTIONARY 349 (5th ed. 1979). While the Mississippi court has rejected the term cy pres and its connotations of the prerogative power of the English crown, the court has established the doctrine of equitable approximation as a basic tenet of equity jurisdiction.

> [I]t should be observed that the *cy pres* practice is not to be confused with the equitable doctrine of approximation which has grown up in the judicial administration (as distinguished from the judicial creation) of charitable trusts. The ecclesiastical rule of cy pres is one thing, and the equitable rule of approximation is distinctly another. Their purpose, and their application are entirely different . . . . It is a natural and necessary branch of the jurisdiction over charitable trusts that the means or details prescribed for their administration should be subject to be molded so as to meet any exigency which may be disclosed by a change of circumstances, and to relieve the trust from a condition which imperils or endangers the charity itself or the funds provided for its endowment and maintenance . . . . But the jurisdiction of courts of equity to supervise the execution of charitable trusts does not include the power to alter the terms of the trust.

National Bank v. Savarika, 167 Miss. 571, 593, 148 So. 649, 654-55 (1933). As the court later noted:

> [T]here has been much debate regarding the nature and historical source of this power [to supplement and amend the terms of a trust]. . . . The debate misses the mark. That the power exists and has been recognized in our law is

mation, modifies this "all-or-nothing" aspect of the common-law Rule by allowing the partial validation of an otherwise invalid interest.[45] Under equitable approximation, a court may modify the terms of a void interest to conform to the Rule, thereby giving effect to the dominant intent of the creator of the interest as far as the Rule allows.[46]

Equitable approximation was adopted by the Mississippi court as a curative measure for perpetuities violations in *Carter v. Berry*.[47] In *Carter*, the testator's will provided that the bulk of his estate was to be placed in trust for the benefit of his grandchildren.[48] The trust was to terminate and be distributed "when my youngest grandchild (whether

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> what counts. The labels fade into insignificance in the face of the content of the power.

Estate of Bunch v. Heirs of Bunch, 584 So. 2d 284, 286 (Miss. 1986).

[45] 5A R. POWELL, *supra* note 3, ¶ 827C.

[46] *Id.* Thus, as a principle of reformation, equitable approximation is a doctrine of much broader application than wait-and-see; whereas wait-and-see operates to save only those interests that actually vest within the period of the Rule, equitable approximation validates all interests that violate the Rule unless its operation is restricted in some manner. Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 4 (1963).

[47] 243 Miss. 321, 140 So. 2d 843 (1962). The *Carter* decision is extensively analyzed in Comment, *That Simple and Clear Rule—The Common Law Rule Against Perpetuities in Mississippi*, 34 MISS. L.J. 63 (1962).

The landmark case establishing equitable approximation as a method of perpetuities reform was Edgerly v. Barker, 66 N.H. 434, 31 A. 900, 902 (1891). In *Edgerly*, the testator's will provided that the bulk of his estate was to be held in trust until the youngest of his grandchildren had reached 40 years of age, at which time the estate was to be distributed. *Id.* at 901. Since the testator was survived by two of his children, the gift to the grandchildren violated the common-law Rule. *Id.* at 904. On appeal, the New Hampshire Supreme Court held that the age contingency for distribution should be cut down to 21, since such an alteration would more closely effectuate the testator's intent than declaring the entire interest invalid. *Id.* at 916.

> [The testator's] intent that the grandchildren shall not have the remainder till the youngest arrives at the age of forty years in modified by his intent that they shall have it, and that the will shall take effect as far as possible. The forty years are reduced to twenty-one by his general approximating purpose, which is a part of the will.

Id. The *Edgerly* decision was extensively discussed by the *Carter* court in its analysis of judicial approximation powers. *See Carter*, 243 Miss at 371-75, 140 So. 2d at 852-54.

Following the lead of New Hampshire and Mississippi, other states have recognized the doctrine of equitable approximation by judicial decision. *See In re* Estate of Chun Yuan Yee, 52 Haw. 40, 469 P.2d 183, 187 (1970) (holding that interest which would violate Rule would be reformed within limits of Rule so as to most closely approximate intent of creator of interest); *In re* Foster's Estate, 190 Kan. 498, 376 P.2d 784, 789-90 (1962) (utilizing equitable approximation to excise age contingency of 23 from trust provision and allowing interests to pass instead at end of preceding life estate).

[48] *Carter*, 243 Miss. at 356-57, 140 So. 2d at 845.

now living or hereafter born) shall become twenty-five years of age."[49] The will was subsequently challenged by the testator's daughters, the only other living heirs, who had been expressly excluded from the will on the grounds that adequate provisions had been made for them during the testator's lifetime.[50] The trial court ruled that the trust provision violated the Rule and was completely void.[51]

On appeal, the supreme court originally reversed, holding that the trust provision was not void as to the grandchildren living at the testator's death.[52] In a subsequent en banc opinion issued on suggestion of error, the court affirmed its position that the interests of existing grandchildren were valid.[53] The court then held that, in the alternative that the interests of all possible grandchildren could be considered contingent,[54] the doctrine of equitable approximation would be applied, and the terms of the trust were therefore modified to provide for distribution of the trust principal when the youngest grandchild reached the age of twenty-one.[55] In reaching this conclusion, the court

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[49] *Id.* at 357, 140 So. 2d at 845.

[50] *Id.*, 140 So. 2d at 846.

[51] *Id.*

[52] *Id.* at 358, 140 So. 2d at 846. The original decision of the court is reported at Carter v. Berry, 243 Miss. 321, 136 So. 2d 871 (1962). In the original opinion, the court declined to issue any decision on participation in the trust by any grandchildren born after the testator's death. *Carter*, 243 Miss. at 348, 136 So. 2d at 881.

[53] *Carter*, 243 Miss. at 363, 140 So. 2d at 849. In affirming the validity of the interests held by existing grandchildren, the court rejected the all-or-nothing rule of class gifts first established in Leake v. Robinson, 2 Meriv. 373, 35 Eng. Rep. 979 (1817). Where the Rule is applied to class gifts, the all-or-nothing rule provides that the interests of all members of the class are void if it is possible that the interest of any member of the class could vest beyond the period of the Rule. L. SIMES & A. SMITH, *supra* note 6, § 1265. This application of the Rule to class gifts requires that a class gift stand or fall as a unit and that both the minimum and maximum membership of the class be established within the period of the Rule. *Id.* The *Carter* court noted that the all-or-nothing rule was not well founded in either logic or the law and declined to adopt the rule in Mississippi. *Carter*, 243 Miss. at 368, 140 So. 2d at 851.

One commentator has suggested that *Carter* did not in practice reject the all-or-nothing rule of class gifts, but rather avoided its application by altering the terms of the trust through equitable approximation. Comment, *supra* note 47, at 68. Rejection of the application of the *Leake* doctrine would have required the court to invalidate the interests of some of the grandchildren, a result that was avoided by application of equitable approximation. *Id.*

[54] *Carter*, 243 Miss. at 369, 140 So. 2d at 851. The court noted several characteristics of the disposition to the grandchildren that indicated the interests might be contingent upon survival until the time at which the trust was to be distributed. *Id.* at 363, 140 So. 2d at 849.

[55] *Id.* at 378, 140 So. 2d at 855-56.

noted that, while equitable approximation was an essential component of a court's equitable powers and could be used where it was impossible to dispose of property in the exact manner provided by the testator,[56] appeal to the equitable power of modification was not appropriate in all cases.[57] Where an examination of the testator's will in light of the circumstances under which it was written indicated that the dominant intent of the testator would be more completely effectuated by invalidating the interest completely rather than modifying its terms, equitable approximation should not be applied and the entire interest should fail.[58] The court noted this was not the case in *Carter*.[59]

> Appellees want us to strike down the dominant intent of the entire will, that testator's grandchildren should have the bulk of his estate, and thereby to vest it in his daughters, despite his manifest intent that they should not have it. The time when the grandchildren should have the estate was secondary and subordinate to the intent that they should receive it.[60]

Thus, to avoid an expressly unintended result, the court applied equitable approximation to modify the terms under which the intended beneficiaries took their interests.[61]

While not restricted to the issue of perpetuities violations,[62] other decisions following *Carter* have discussed both resort to and the scope of relief available under the doctrine of equitable approximation. In *Estate of Bunch v. Heirs of Bunch*,[63] the court noted that the use of equitable approximation was authorized and, indeed, the court's responsibility where its use was "necessary to effect the testator's domi-

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[56] *Id.* at 375, 140 So. 2d at 854.

[57] *Id.* at 377, 140 So. 2d at 855.

[58] *Id.*

[59] *Id.* at 376, 140 So. 2d at 855.

[60] *Id.*

[61] *Id.*

[62] Additional Mississippi cases dealing with equitable approximation include May v. Hunt, 404 So. 2d 1373, 1381 (Miss. 1981), wherein the court utilized the doctrine to shorten the duration of a testamentary trust. *Id.* In *In re* Estate of Kelly, 193 So. 2d 575, 578 (Miss. 1967), equitable approximation was applied to limit a restraint on alienation of real property. *Id.* The court in Mississippi Children's Home Soc'y v. City of Jackson, 93 So. 2d 483, 487 (1956), refused to apply equitable approximation, noting that the doctrine could not be used to vary the administrative terms of a charitable trust where the instrument creating the trust itself specified how the trust property was to be used if the condition requiring the administrative alteration ever occurred. *Id.*

[63] 485 So. 2d 284 (Miss. 1986).

nant intent *and* avoid a clearly unintended consequence,"[64] implying that resort to equitable approximation was not conditioned upon the mere failure of an interest, but that the failure must result in an alternative grant of the interest to other parties that runs counter to the express intentions of the creator of the interest.[65]

The scope of the equitable approximation remedy itself was examined in *Tinnin v. First United Bank*.[66] While noting that judicial authority under the doctrine was to be "exercised with discretion and restraint,"[67] the court stated that equitable approximation not only permitted the injection of supplementary and administrative provisions into the terms previously supplied by the testator,[68] but also authorized the court to modify or excise testamentary terms where those provisions were incapable of performance.[69]

C. *In re Estate of Anderson*

In re Estate of Anderson[70] represents Mississippi's latest treatment of the Rule. Charles M. Anderson died in December, 1984.[71] In addition to several specific bequests to his nephew, Howard W. Davis, the testator's will established a trust, the income from which was to be used "for the education of the descendants of F.A. Anderson, Sr. [testator's father] for a period of twenty-five (25) years from the date of the admission of this last will and testament for probate."[72] At the conclusion of this twenty-five year period, all principal and income re-

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[64] *Bunch*, 485 So. 2d at 285 (emphasis added) (citing *Pace*, 347 So. 2d at 1318; *In re* Estate of Granberry, 310 So. 2d 708, 711 (Miss. 1975) (all minor, subordinate and technical rules of construction must yield to paramount intent of testator); Citizens Nat'l Bank v. Longshore, 304 So. 2d 287, 290 (Miss. 1974) (cy pres); *Carter*, 243 Miss. at 376, 140 So. 2d at 855 (equitable approximation)).

[65] *See Carter*, 243 Miss. at 376-77, 140 So. 2d at 855-56 (applying equitable approximation where failure to do so would allow property to pass to those excluded from will by express provision).

[66] 502 So. 2d 659 (Miss. 1987).

[67] *Tinnin*, 502 So. 2d at 664. The court noted, "Unlike the preacher, the probate judge should arrogate to himself no power to make the testator nobler in death than his will reflects him to have been in life." *Id.* (citing Connecticut Bank & Trust Co. v. Johnson Memorial Hosp., 30 Conn. Supp. 1, 294 A.2d 586, 592-93 (1972)).

[68] *Id; see also Bunch*, 485 So. 2d at 286-87 (noting administrative provisions that may be read into trust's framework).

[69] *Tinnin*, 502 So. 2d at 664; *see also supra* notes 54-60 and accompanying text (discussing *Carter*).

[70] 541 So. 2d 423 (Miss. 1989).

[71] *Anderson*, 541 So. 2d at 424.

[72] *Id.*

maining in the trust were to go to Davis.[73] The will was admitted to probate in December, 1984.[74] In 1986, the executor of the estate petitioned the court for construction of the will, specifically requesting an interpretation of the trust provision.[75] Davis filed a response with the court, arguing in part that the interests held by beneficiaries of the trust violated the Rule because of the twenty-five year term of the trust's existence.[76] In subsequently holding that these interests did not violate the Rule, the trial court applied equitable approximation to the trust provisions and modified its terms to provide that the trust would continue "for a period of twenty-five (25) years or twenty-one (21) years from and after the death of Howard W. Davis, whichever first occurs."[77]

On appeal, Davis argued that the trial court erred in finding that the trust did not violate the Rule and in applying equitable approximation to bring the beneficial interests in the trust within the period of the Rule.[78] In affirming the lower court's conclusion that the interests did not violate the Rule, the supreme court noted that its experience with the Rule exemplified "the historical tendency of property law to forget the original reason for its rules"[79] and stated that the absurd results generated by an unbending approach to the Rule were "a major force fueling the flames of common sense and fidelity to principle and purpose which have marked this state's experience [with the Rule] in recent times."[80] The court then noted that the result of its past experience with the Rule had been the adoption of wait-and-see and equitable approximation as modifications to the common-law approach.[81] Therefore, the court asserted, the conclusion that any interest was void

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[73] *Id.* at 425.

[74] *Id.* at 426. For reasons not stated in the record, the will was subsequently admitted to probate in solemn form in February, 1986. *Id.*

[75] *Id.*

[76] *Id.* Davis also contended that the trust provisions violated the Rule because the commencement of the trust was conditioned upon an administrative contingency, the admission of the will to probate. *Id.* Neither the trial nor appellate decisions reflect that this aspect of the trust was considered. *Id.*

[77] *Id.*

[78] *Id.* at 427 (citing Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1870 (1986)).

[79] *Id.* at 428.

[80] *Id.*

[81] *Id.* at 429. In addition to wait-and-see and equitable approximation, the court noted that the abolition of the all-or-nothing rule of class gifts constituted a third modification of the common-law Rule in Mississippi. *Id.*; *see also supra* note 53 (discussing common-law rule as established in *Leake*).

under the common-law Rule was "subject to the Mississippi modifiers."[82]

Ultimately, the court concluded that the wrong "Mississippi modifier" had been used in applying equitable approximation to the trust provision.[83] The court noted it was possible at the time the interests were created that some or all of them might not vest within the period of the Rule, thus rendering them void under the common-law approach.[84] However, events that had occurred subsequent to the creation of the interest could be considered under wait-and-see;[85] if these events made it impossible for remote vesting to occur, the interest was valid.[86] The court noted that because of the time which had already passed since the trust was established, the original term of the trust would continue for only twenty years beyond the date of the court's decision.[87] Since there were still lives in being in existence as of the

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[82] *Anderson*, 541 So. 2d at 431.

[83] *See id.* at 436 (modifying trial court judgment to extent equitable approximation was applied to modify duration of testamentary trust).

[84] *Id.* at 431. The court noted that it was possible that all of the measuring lives could die more than 21 years before the termination of the trust. *Id.* It was also possible that no beneficiaries would qualify for educational benefits within the term of the trust. *Id.*

[85] *Id.* at 432.

[86] *Id.* at 433.

[87] *Id.* The court noted that the period of the trust would end on December 21, 2009, some 25 years after the admission of the will to probate. *Id.* This termination date was less than 21 years from the date of the Mississippi Supreme Court's *Anderson* decision. *Id.*

Note that the same result would not have been reached if the court had considered the date at which suit was filed (1986), *id.* at 426, or the date at which the trial court opinion had been rendered (1987), *id.*, as the time at which the rule of law to be applied was to be selected. If either of these dates had been used, it would still have been possible for the interests in the trust to vest remotely. Since many of the interests in the trust still remained contingent, selection of either of the earlier dates would have placed the court in a *Pace*-like situation; the court would have been faced with a scenario in which the contingency had not occurred and in which it was not possible to establish conclusively that the interest must vest or fail within the period of the Rule. Thus, under the *Pace* and *C & D Inv. Co.* rationale, the court could not apply the wait-and-see doctrine because of the nonoccurring contingency; resort to equitable approximation, as applied by the trial court, would have been the only method of salvaging the interests from a violation of the Rule. *See supra* notes 25-42 and accompanying text (discussing *Pace* and *C & D Inv. Co.*). The court avoided this dilemma by adopting the date of its decision as the date at which it would determine which rule of law would be applied to the case. *Anderson*, 541 So. 2d at 436. This adoption of the date of decision as the time at which the applicable law would be determined was made without any discussion by the court as to the propriety of taking such action. *See id.* at 432-36 (lacking any discussion of adoption of starting date).

date of decision,[88] it was no longer possible for any interest to vest beyond the period of the Rule.[89] Because it had waited and seen and all contingent interests would either vest or fail within the Rule, the supreme court modified[90] the trial court's decision to the extent that equitable approximation had been applied to reform the term of the trust; then the supreme court held that, through the application of wait-and-see, the trust was to continue for its original twenty-five year period.[91]

II. The Case of the Nonoccurring Contingency: Needed Developments in Mississippi's Perpetuities Law

Though *Anderson* has served to clarify many of the issues left unresolved by previous perpetuities decisions, perhaps the greatest significance of the decision lies in the questions it left unanswered. Previous decisions established that wait-and-see can be applied where the contingency has occurred,[92] and *Anderson* has extended the application of that doctrine to cases where it is impossible for the interest to vest too remotely;[93] however, the continued vitality of the distinction in applying wait-and-see based upon the occurrence or nonoccurrence of the contingency can be questioned. The *Anderson* opinion contained an extensive analysis of the modifications to the common-law Rule recognized in Mississippi; yet at no point in that discussion is the occurrence of the contingency cited as a relevant factor in determining whether the wait-and-see modification should be applied.[94] The conspicuous absence of discussion on this point, combined with *Anderson*'s cryptic assertion that "[o]ur cases have not yet fleshed out the meaning of our wait-and-see doctrine . . . and nothing said here should be taken as expressing a view on the point,"[95] may indicate that the court is not comfortable supporting a distinction that no other jurisdiction recognizes.[96]

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[88] *Anderson*, 541 So. 2d at 433.

[89] *Id.*

[90] *Id.* at 436.

[91] *Id.*

[92] *See supra* notes 18-24, 33-42 and accompanying text (discussing *Phelps* and *C & D Inv. Co.*).

[93] *See supra* notes 83-91 and accompanying text (discussing *Anderson*).

[94] *See Anderson*, 541 So. 2d at 429-33 (noting adoption of various Mississippi modifiers to common-law Rule, but failing to discuss wait-and-see distinction based on occurrence or nonoccurrence of contingency).

[95] *Id.* at 433 n.20.

[96] *See* 5A R. Powell, *supra* note 3, at ¶ 827B-D (noting various wait-and-see meth-

Confusion also abounds as to the boundaries of equitable approximation. While the doctrine was used in *Carter* to prevent a violation of the Rule, *Carter* was rendered prior to *Phelps* and its adoption of wait-and-see.[97] Since that time, no indication has been forthcoming as to the effect wait-and-see may have on the use of equitable approximation, and priority in application of the two doctrines remains unclear.

Thus the status of Mississippi's perpetuities law remains uncertain, particularly as to the result to be had where the contingency on which an interest is based has not occurred or remote vesting has not become otherwise impossible. Faced with such circumstances, the court would have two options in ruling on the status of the interest: (1) apply wait-and-see and refuse to rule presently on the validity of the interest;[98] or, (2) apply equitable approximation and reform the interest to conform to the limitations of the Rule.[99] Each of these options is considered below.

A. Immediate Application of Wait-and-See

Applying wait-and-see to cases where the contingency has not yet occurred would carry that doctrine to its logical conclusion and is the result sanctioned by the Restatement (Second) of Property, as well as a majority of jurisdictions in which wait-and-see has been adopted.[100] However, it is the extension of wait-and-see to cases where waiting and seeing will actually be required that raises the most troubling aspects of the doctrine. The fact that the validity of an interest may not be determined for a period of lives in being plus twenty-one years raises grave concerns as to the impact wait-and-see could have on the alienability of property subject to a future interest whose validity is uncertain.[101] While wait-and-see does not allow property to be tied up for a period of time longer than that permitted under the common-law Rule,

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ods adopted by other jurisdictions, none of which predicated application of wait-and-see upon occurrence of contingency).

[97] *See Phelps*, 254 Miss. at 779, 183 So. 2d at 158 (rendered in 1966); *Carter*, 243 Miss. at 321, 140 So. 2d at 843 (rendered in 1962).

[98] *See infra* notes 100-113 and accompanying text (discussing immediate application of wait-and-see).

[99] *See infra* notes 114-26 and accompanying text (discussing immediate application of equitable approximation).

[100] *See* RESTATEMENT (SECOND) OF PROPERTY § 1.3 (1983) (adopting fully applicable wait-and-see provision); *see also* 5A R. POWELL, *supra* note 3, ¶ 827B-D (noting wait-and-see provisions of other jurisdictions that call for complete application).

[101] Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179, 188 (1953).

it does allow property to remain tied up longer during that period.[102] These factors of uncertainty and inalienability are particularly foreboding where title to real property is involved.[103] Additionally, a delayed determination as to the validity of a future interest not only creates uncertainty as to the status of that interest, but may also render uncertain the status of other interests contained within the scheme of disposition.[104] While the application of infectious invalidity under wait-and-see is unclear, it is possible that a postponed determination of the validity of one interest may cause the validity of other interests to be questioned also.[105]

Perhaps the greatest difficulty with the application of wait-and-see to interests where the contingency has yet to occur would be the increased burden such cases will place upon the court system. The altered use of measuring lives necessitated by wait-and-see would pose a costly administrative burden on the court.[106] Unlike the common-law Rule, wait-and-see utilizes measuring lives to determine the allowable period of waiting in a manner that requires the actual tracing of those individuals.[107] Thus, in determining whether the waiting period has terminated or whether it continues to run, the court would be required to trace actual births, deaths, marriages, or other events that could effect the occurrence of the contingency within the period of the Rule.[108] In addition, continued resort to litigation would be necessary during both the pendency of the waiting period,[109] as well as at the conclusion of the period, to determine if the interest had in fact vested properly and, if so, who held the interest.

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[102] Comment, *Wait-and-see and the Rule Against Perpetuities*, 13 AM. U.L. REV. 67, 71 (1963).

[103] Simes, *supra* note 101, at 188.

[104] *Id.* at 189. For analysis of the doctrine of infectious invalidity, see *supra* note 14.

[105] Simes, *supra* note 101, at 189.

[106] Waggoner, *supra* note 16, at 576.

[107] *Id.*

[108] *Id.*

[109] 5A R. POWELL, *supra* note 3, ¶ 827F[3]. Application of wait-and-see is often predicated upon a finding that the common-law Rule will be violated by the interest, thus necessitating an initial suit to determine that wait-and-see can in fact be applied. *Id.* During the pendency of the waiting period, suits may be necessary to determine which individuals constitute measuring lives and whether those measuring lives have expired. *Id.* Additional suits may be necessary to deal with administrative matters of the estate, such as intermediate payments of trust income during the waiting period. *Id.* The ultimate impact of litigation necessitated by the application of wait-and-see would be diminished benefits for the intended beneficiaries as a result of increased attorneys' fees. Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23, 44 (1987).

Assuming that, despite the foregoing list of horrors, the Mississippi Supreme Court were to extend application of wait-and-see to interests where the contingency has not occurred, the question still remains whether the court would employ equitable approximation at the end of the waiting period if the interest ultimately failed to vest. The policy embodied in the use of equitable approximation is not dependent upon the time of usage for its validity, and the *Anderson* court itself implied that the conclusion that an interest was void would be further subjected to the application of equitable approximation.[110]

Employment of equitable approximation after the required period of waiting would likely result in a decreased need for resort to the doctrine, since it can be anticipated that a large number of interests would in fact vest during the pendency of wait-and-see; a decreased usage of equitable approximation would be comforting to many who find reformation an objectionable doctrine.[111] Yet the effect a prolonged waiting period would have on the results obtained through reforming an interest is unclear. While it may be argued that judicial subjectivity would be decreased by exercising equitable approximation after a waiting period during which rational alternatives for reforming an interest would be clarified,[112] the more cogent argument seems to be that delayed application of equitable approximation would cause judges to subjectively erect schemes of disposition more akin to their own views on the disposition of the property under the current circumstances than to the scheme of disposition laid down by the testator years before.[113]

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[110] *Anderson*, 541 So. 2d at 431. The RESTATEMENT (SECOND) OF PROPERTY § 1.5 (1983) mandates that equitable approximation be applied where wait-and-see does not validate an interest:

> If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property shall be disposed of in the manner which most closely effectuates the transferror's manifested plan of distribution, which is within the limits of the rule against perpetuities.

Id.

[111] 5A R. POWELL, *supra* note 3, ¶ 827F[3].

[112] *Id.*

[113] *Id.* R. Powell notes that a judge applying equitable approximation at the outset will more likely be governed by the testator's plan of disposition than one applying the doctrine at a later date when events that have transpired since the creation of the interest may influence the judge's fidelity to the testator's original intent. *Id.* Belated application of equitable approximation would consequently result in a greater probability of judicial rewriting of an instrument based upon the subjective beliefs of the court. *Id.*; *see also* Bloom, *supra* note 109, at 46 (supporting this criticism of delayed application of equitable approximation).

B. *Immediate Application of Equitable Approximation*

As an alternative to immediate application of wait-and-see with the possible delayed application of equitable approximation, the court could choose to apply equitable approximation at the outset and reform the interest immediately so as to conform to the Rule.[114] A compelling argument exists against the immediate application of equitable approximation, in that such action subverts the policies that support usage of the reformation power; if equitable approximation is to be used to enable the court to effectuate the intent of the testator as closely as possible, logic would imply that wait-and-see should be initially applied to determine if vesting can occur as the testator expressly provided before resorting to reforming the interest.

However, the argument that, by policy, equitable approximation must be deemed a last resort remedy is based on the assumption that initial resort to the doctrine would preclude the interest from taking effect as the testator expressly provided. This assumption fails to recognize that, in most cases of perpetuities violations, equitable approximation can be utilized to imply only a savings clause[115] into the suspect

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[114] The decision to apply equitable approximation initially in these situations necessarily embraces the distinction based on the occurrence or nonoccurrence of the contingency previously established in the Mississippi court's wait-and-see cases. *See supra* notes 18-42 (discussing *Phelps*, *Pace*, and *C & D Inv. Co.*). Thus the decision to apply equitable approximation at this point would be subject to the charge that it allows the party challenging an interest to determine the rule of law to be applied by choosing the time at which the suit is filed. Simes, *supra* note 101, at 185. If the party files suit before the contingency occurs, equitable approximation would apply; if suit were brought after the contingency occurred or after a time at which remote vesting was no longer possible, wait-and-see would be applied. *Id.* Although one commentator has noted that the facts pertinent to a perpetuities decision should not be determined as of the time suit is filed "since that would give the plaintiff an opportunity, by careful timing, to determine the validity of the future interest," *id.*, such an effect would not necessarily occur where equitable approximation, rather than invalidity under the common-law Rule, is the alternative to applying wait-and-see. Where reformation of an otherwise invalid interest is the required alternative at the initial stage, it would be impossible for a party to produce the total invalidity of an interest. *See* Browder, *Construction, Reformation and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 2 n.6 (1963) (noting that where equitable approximation is available for application following initial period of wait-and-see, timing of lawsuit cannot determine validity of interests but can only produce reformation of otherwise invalid interests). The most damaging result that could occur would be the reformation of an interest, and with the ability to reform an interest through the implication of a savings clause, there is an overwhelming likelihood that reformation itself would not result in any limitation of the interest as originally created.

[115] Savings clauses typically consist of two components, the first of which may be designated the perpetuity-period provision. Waggoner, *Perpetuities Reform*, 81 MICH. L. REV. 1718, 1725 (1983). This provision designates a group of persons and expressly pro-

interest, thereby leaving the interest free to take effect as the testator intended, if possible.[116] When applied in this manner, equitable approximation takes advantage of a wait-and-see period and allows the interest to become effective as originally planned if it does in fact ultimately vest within the Rule; only when conformity with the Rule is impossible does the savings clause implied by equitable approximation become effective.[117]

This approach to equitable approximation was illustrated by the trial court's disposition of the *Anderson* case, where the trial court reformed the beneficial interests in the trust by implying a savings clause into the trust provisions.[118] In its final order, the court determined that the term of the trust was to continue for a twenty-five year period, the testator's original provision, or for twenty-one years from and after the end of the measuring life, a savings clause provision, whichever occurred first.[119] Thus, if the interests in the trust could vest as originally intended and that vesting were to occur within the period of the Rule, the trust would take effect as the testator planned; it was only when the beneficial interests in the trust could not properly vest that the savings clause implied into the trust provisions would serve to alter the operation of the trust.[120] Thus the trial court made use of its equitable approximation powers in a manner that subjected the beneficial inter-

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vides that the interest in question must terminate no later than 21 years after the death of the last survivor of the group. *Id.* The second component of a typical savings clause provision is the gift over component, which creates an interest that is certain to vest at the end of the period provided for in the perpetuity-period provision, but which will only take effect if the original interest does not vest as initially intended. *Id.*

[116] Browder, *supra* note 114, at 5-6. Use of the savings clause form of reformation is particularly appropriate where the possibility of remote vesting is due to characteristics of the interest that place it within one of the categories of infamous perpetuities violations. *Id.* In these cases, the possibility of remote vesting exists virtually in theory alone, and it is reasonably foreseeable that vesting will actually occur within the period of the Rule. *Id.* By reforming through the implication of a savings clause, the original intention of the creator of the interest is left intact and is ready to take effect when, in all probability, actual vesting does occur. *Id.*

[117] *Id.* at 8. Implication of a savings clause allows for alteration from the original course of disposition only when vesting becomes impossible within the limitations of the original instrument. *Id.* Thus, when comparing the results obtained through equitable approximation and wait-and-see, no difference in outcome is apparent; the consideration of actual events under wait-and-see produces the same result that is also achieved by equitable approximation's advanced consideration that such events may occur. *Id.*

[118] *Anderson*, 541 So. 2d at 426.

[119] *Id.*

[120] *See id.* (reading of trial court modification of testamentary trust indicates that savings clause provision implied into terms of trust would only become effective if vesting within period of Rule did not first occur).

ests to a type of wait-and-see period; the savings clause utilized by the court embodied a period of waiting under which the trust was given a chance to go into effect as originally planned before any modifications to its terms would be made. Ultimately, this result was no different than that prescribed by the Mississippi Supreme Court in its decision applying wait-and-see.[121] Under either modification of the common-law Rule, the trust would take effect as originally contemplated by the testator.[122] Thus, restricted to its proper sphere as a means of implying savings clauses into potentially invalid interests, equitable approximation provides the possibility of complete, original vesting as envisioned by the wait-and-see doctrine.[123]

While utilizing equitable approximation to imply savings clauses into suspect interests would not minimize certain problems of uncertainty common to both the wait-and-see doctrine and this use of the approximation power, the initial application of the savings clause approach would result in greater efficiency for litigants as well as the court.[124] Since an initial determination of the applicable measuring lives and waiting period is necessary for the formulation of savings clauses, the necessity for litigation during the pendency of and at the conclusion of the waiting period would be far less than that needed under immediate application of wait-and-see.[125] While equitable approximation would offer the same flexibility afforded by wait-and-see, use of the savings clause approach would require the court to initially determine factors that are often the subject of repeated court battles under wait-and-see, thus easing the burden of litigation on all parties involved.[126]

Conclusion

Mississippi has made tremendous strides in simplifying its perpetuities law during the last thirty years; yet that simplification has come

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[121] *See id.* at 426, 436 (reading of trial and appellate court judgments indicates that method, but not result, of validity differs).

[122] *See id.* (reading of judgments entered in case indicates that, while trial court judgment resulted in addition of ultimately unnecessary savings clause to terms of testamentary trust and appellate court judgment applied wait-and-see, both methods of modification would have allowed trust to take effect as originally intended).

[123] *Id.*

[124] *See supra* notes 101-05 (noting tendency to promote litigation).

[125] *See* Simes, *supra*, note 101, at 188-90 (arguing against immediate application of wait-and-see; suggesting that such approach leaves state of title uncertain).

[126] *Id.*

at a price.[127] While wait-and-see and equitable approximation have largely removed the punitive aspects of the common-law Rule, the court has yet to define clearly the scope of the two doctrines; and priority in application remains unclear.[128] Most significantly, the court has offered no signal as to the course it will take when faced with determining the validity of an interest where the contingency on which that interest is based has yet to occur.[129] Though previous decisions of the court indicate that wait-and-see would not be applied, this position is unique among jurisdictions recognizing a perpetuities restriction, and in many respects it violates the policies promoted by the wait-and-see doctrine.[130] Yet it is the application of wait-and-see in these situations that raises the gravest concerns with the doctrine.

Alternatively, application of a savings-clause approach to equitable approximation would provide the same result as that available under wait-and-see while greatly diminishing the burden such cases place upon both the parties involved as well as upon the courts.[131] It is hoped that in resolving this dilemma, the court will find the practical advantages of equitable approximation more appealing than fidelity to the theoretical basis of wait-and-see.

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[127] *See supra* notes 6-91 and accompanying text (discussing modification of common-law Rule).

[128] *See supra* notes 92-99 and accompanying text (discussing unanswered questions).

[129] *See supra* notes 92-96 and accompanying text (noting that court has not directly addressed question of occurrence or nonoccurrence of contingency).

[130] *See supra* notes 94-95 and accompanying text (citing court's reluctance).

[131] *See supra* note 115 (discussing savings-clause approach).

THE AVAILABILITY OF EXTRACONTRACTUAL DAMAGES FOR EMOTIONAL DISTRESS AND ATTORNEYS' FEES IN BAD FAITH BREACH OF INSURANCE CONTRACT CASES*

Introduction

In November, 1977, the Mississippi Supreme Court announced, in *Standard Life Insurance v. Veal*,[1] the creation of a new cause of action which would allow the recovery of punitive damages when an insurer denies a legitimate claim of an insured without an arguable reason.[2] Although founded in a contract setting, this new cause of action was determined to be tortious in nature.[3] The court stated that "punitive damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort."[4] Accordingly, the

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* Best student-written comment. Award by Thomas, Price, Alston, Jones & Davis, Jackson, Mississippi.

[1] 354 So. 2d 239 (Miss. 1977).

[2] *Id.* at 239. Plaintiff, Eugene Veal, sued Standard Life Insurance Company of Indiana for breach of contract in failing to pay the face value of a decreasing term life insurance policy upon the death of his wife, Jessie Lee Veal. *Veal*, 354 So. 2d at 240-42. Standard Life refused to pay because the plaintiff was not the named beneficiary and because no premium was paid for coverage on the life of his wife. *Id.* at 243. The Mississippi Supreme Court was not swayed by the defendant's arguments and awarded the plaintiff $25,000 in punitive damages. *Id.* at 249.

[3] *Id.* at 247. The court cast the denial as "wrong" and described it in terms of gross and reckless negligence. *Id.* (quoting Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970)). The court removed this action from the realm of a normal breach of contract by applying the test used to determine whether punitive damages are appropriate: Did the insurance company have a legitimate or arguable reason for denying its insured's claim? *Id.* at 248. The court held that when an insurance company contests a claim without a legitimate reason it is not a normal breach of contract, but a wrong of a tortious nature. *Id.*

[4] *Id.* at 247 (quoting Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975)). In *Progressive*, decided two years before *Veal*, the Mississippi Supreme Court had denied the recovery of punitive damages to an insurance claimant after the insurance company had failed to carry through on a settlement agreement. *Progressive*, 317 So. 2d at 397. However, the court did lay down a standard for the recovery of such punitive damages when the breach of contract action rose to the level of a tort. *Progressive*, 317 So. 2d at 398 (quoting D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So. 2d 770 (1944)). It was this standard that the *Veal* court lifted and applied. *Veal*, 354 So. 2d at 247.

court found that under certain circumstances tort damages were recoverable for the breach of a contract,[5] and thus a hybrid tort (contract) action, the independent tort of bad faith, was born. The court framed the action in terms of a tort in order to allow for the recovery of punitive damages for the breach of the insurance contract.[6] In order to recover punitive damages in such a contract setting, the plaintiff must pass through two evidentiary levels.[7] First, the plaintiff must prove wrongful denial, which is proved by showing a lack of an arguable reason for the denial of the insured's claim.[8] While this burden of proof is

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[5] *Veal*, 354 So. 2d at 247. The idea of tort damages for actions which result in a breach of a contract are not novel in the state of Mississippi and have been available since 1915. Hood v. Moffett, 69 So. 664 (Miss. 1915). The court in *Hood* denied an award of punitive damages against a doctor who failed to arrive after he had been contacted to deliver the plaintiff's wife's baby when she went into labor. *Id.* at 665. The court stated that punitive damages were not recoverable unless the act or omission constituting the breach of the contract also constituted the commission of a tort. *Id.* at 666. The Mississippi Supreme Court directly relied on the *Hood* decision 29 years later in allowing the recovery of punitive damages when a tree cutter's activities destroyed a landowner's fence and allowed his cattle to escape. D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So. 2d 770 (Miss. 1944). The court stated that "punitive damages may be recovered . . . when the breach is attended by such gross negligence or willful wrong as to amount to a tort." *Id.* at 221-22, 16 So. 2d at 773; *see* Kornblum, *The Current State of Bad Faith and Punitive Damage Litigation In The U.S.*, 23 TORT & INSURANCE L.J. 812, 831-32 (1987-88) (general discussion of compensatory damages recoverable in bad faith action, generally limited to emotional distress and attorneys' fees); Kornblum, *Extracontract Actions Against Insurer: What's Ahead In The Eighties?*, 19 FORUM 58, 66-69(1983) (eighties will see increase in award of emotional distress damages and attorneys' fees).

[6] *Veal*, 354 So. 2d at 248. The court's fear of limiting such actions to actual contract damages was explained by its statement that "[i]f an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity." *Id.* at 248. Therefore the court couched such a refusal to pay in terms of an "intentional wrong" which "constituted an independent tort." *Id.*

[7] *Id.* at 247-48. The court did not enumerate these elements as a direct two-step test. *Id.* However, both elements were shown to be the predicate for the recovery of punitive damages: (1) lack of an arguable reason for the denial of a legitimate claim, and (2) an intentional wrong or gross negligence. *Id.* This two-step process was further clarified in two federal cases decided shortly after *Veal*. *See* Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 990 (5th Cir. 1978) (holding that both absence of justifiable reason and intentional wrong are necessary for recovery of punitive damages); Michael v. National Sec. Fire & Casualty Co., 458 F. Supp. 128, 131 (N.D. Miss. 1978) (holding that punitive damages are not proper if insurer has legitimate or arguable reason for failing to pay claim; moreover, such damages may not be awarded absent finding of some intentional wrong, insult, abuse, or gross negligence which amounts to independent tort).

[8] *Veal*, 354 So. 2d at 248. The court simply stated that the existence of an "arguable reason" would preclude the recovery of punitive damages. *Id.* The court did not attempt to define or clarify this term. *Id.*

higher than that required for a normal breach of contract case, it is not sufficient to recover punitive damages.[9] The second level which must be proved in order to recover punitive damages is the existence of the heightened "independent" tort.[10]

This heightened tort is evidenced by an intentional wrong such as fraud, insult or abuse, gross negligence, reckless or ruthless disregard of the rights of the insured, or gross, callous, or wanton conduct towards the insured.[11] In the eleven years since *Veal*,[12] the case law on the recovery of punitive damages in an insurance contract setting has become quite refined.[13] However, a question of damages has remained unanswered. *Veal* made it clear that contractual and punitive damages are recoverable, but are ordinary tort damages recoverable for the bad faith denial of an insurance claim?[14] If answered in the affirmative, this question opens a virtual Pandora's box of new questions. What must be proved in order to recover such damages? What damages are availa-

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[9] *Id.* at 247. The court made it clear that while the existence of an arguable reason will preclude recovery of punitive damages, the absence of such a reason will not automatically warrant the recovery of such damages. *Id.* Mere negligence or any other unwarranted reason which falls short of an intentional wrong or gross negligence will not be sufficient to recover punitive damages. *Id.*; *see* Weems v. American Sec. Ins., 486 So. 2d 1222, 1226-27 (Miss. 1986) (absence of arguable reason does not lead inexorably to assessment of punitive damages; there must be some willful or malicious wrong or gross or reckless disregard for rights of others).

[10] *Veal*, 354 So. 2d at 247. The court is referring to the conduct which results in the breach of contract as being so egregious that it results in a tort independent of the actual contract breach. *Id.*

[11] *Id.* The court took these elements from two similar cases in which children were struck by negligently driven automobiles. *See* Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (punitive damages are recoverable for intentional or willful conduct or for such gross and reckless negligence as to constitute wrong); Fowler Butane Gas Co. v. Varner, 141 So. 2d 226, 233 (Miss. 1962) (for punitive damages, injury must have some element of aggression, coloring of insult, malice, gross negligence, or evidence of disregard for rights of others).

[12] *Veal*, 354 So. 2d at 239. *Veal* was decided on November 9, 1977, with a rehearing being denied on February 8, 1978. *Id.*

[13] *See* Pioneer Life Ins. Co. v. Moss, 513 So. 2d 927, 930 (Miss. 1987) (court alluded to a two-step process for determining whether the imposition of punitive damages is proper: absence of arguable reason and intentional or willful conduct of heightened nature such as wanton or reckless conduct or fraud and deceit); Aetna Casualty & Surety Co. v. Day, 487 So. 2d 830, 832 (Miss. 1986) (beyond lack of arguable reason claimant must show by preponderance of evidence that insurer either acted with malice or acted with gross negligence or reckless disregard for rights of others).

[14] *See* Note, *Damage Measurements for Bad Faith Breach of Contract: An Economic Analysis*, 39 STAN. L. REV. 161, 172-80 (1986) (excellent discussion of elements of extracontractual damages as including attorneys' fees, emotional distress, and economic loss as viewed by numerous jurisdictions).

ble? Must the tort of bad faith be proved in order to recover, or is wrongful denial all that is necessary to recover? This comment will address each of these questions in relation to the most recent Mississippi Supreme Court decisions in this area and will focus on the two most important areas of extracontractual damages:[15] emotional distress damages[16] and attorneys' fees.[17]

I. *Blue Cross & Blue Shield v. Maas*

In the recent case of *Blue Cross & Blue Shield v. Maas*,[18] the Mississippi Supreme Court appears to have answered the question of whether ordinary tort damages are available for the bad faith denial of an insurance claim. In *Maas*, the plaintiff's claim was denied because it was filed after he left the employment of the company that carried his group policy.[19] However, it was filed during the remainder of the prepaid period of his coverage term,[20] and the denial of his claim was therefore a wrongful denial without an arguable reason.[21] The trial

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[15] Hollinshed v. Yazoo & M.V.R. Co., 99 Miss. 464, 474, 55 So. 40, 41 (1911). Earlier the Mississippi Supreme Court identified "mental suffering" as a result of the defendant's tortious conduct as an element of damages. *Id.* at 475, 55 So. at 41. However, the court has continued to limit the recovery of this element ever since it was identified. Gulf & S.I.R. Co. v. Beard, 129 Miss. 827, 834, 93 So. 357, 358 (1922). In *Beard*, the court held that "there can be no recovery of actual damages for annoyance, worry, or mental anguish disconnected from mental suffering." *Id.* at 834, 93 So. at 358.

[16] *See* Freeland & Freeland, *Bad Faith Litigation: A Practical Analysis*, 53 MISS. L.J. 237, 258-59 (1983) (general discussion of emotional distress damages as element of extracontractual bad faith damages).

[17] Central Bank v. Butler, 517 So. 2d 507, 512 (1987). The general rule as to the awarding of attorneys' fees prior to December, 1987, was that attorneys' fees could not be awarded as damages in absence of contractual provisions or statutory authority unless punitive damages were proper. *Id.*

[18] 516 So. 2d 495 (1987), *reh'g denied*, 516 So. 2d 495 (Miss. 1988); insured, Stanley Maas, brought a bad faith failure to pay suit against his insurer, Blue Cross & Blue Shield of Mississippi, in the Circuit Court of Smith County in early 1985. *Maas*, 516 So. 2d at 495-96.

[19] *Id.* at 496. Plaintiff had his family health insurance through a Blue Cross and Blue Shield group plan sponsored by his employer, Raleigh Forest Products. *Id.*

[20] *Id.* Plaintiff Maas quit his job with Raleigh Forest Products on October 13, 1984, but his insurance premiums were paid up through October 31, 1984. *Id.* Also, when Raleigh paid its November premiums, the plaintiff remained on the pay invoice and was thus covered through November 30, 1984. *Id.* Plaintiff's wife had entered the hospital on October 1, 1984, and it was the submission of her hospital bills during the period after the plaintiff had left Raleigh Forest Products which was disputed by the insurer. *Id.* at 495.

[21] *Id.* at 497. The court found that the defendant, Blue Cross & Blue Shield, had denied the plaintiff's claims after its own investigation had determined that the insurer

court jury found that this wrongful denial did rise to the level of a wanton and malicious tort[22] and returned a verdict for the plaintiff in the amounts of $1,820 in actual damages and $100,000 in punitive damages.[23] Thus the majority opinion was an ordinary bad faith case. However, it appears that a new source of recovery was opened to the plaintiffs in a concurrence written by Justice Robertson and joined by Justices Dan Lee, Prather, Anderson, Griffin, and Zuccaro.[24]

In his concurrence Robertson stated, "This is another of those cases in which the parties and the court with justice should have considered and litigated a claim for ordinary tort damages."[25] Robertson further stated:

> In cases such as this, our law of damages allows one such as Stanley E. Maas to plead and prove and, if he is in that successful, recover, over and above his contract claim, the following damages: (1) economic losses incurred as a proximate result of the insurer's tortious conduct, including his attorneys' fees and legal expenses reasonably and necessarily incurred. Whether such awards be considered as components of economic loss tort damages, or as awards required by other law, matters not; (2) emotional distress damages.[26]

While the underlying basis of the action is a contract of insurance, the court has allowed the recovery of tort remedy punitive damages when such a breach of contract rises to the level of an independent and heightened tort,[27] and it now appears that the court has said that other

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had wrongfully terminated coverage. *Id.* at 498. The court further noted that these actions were not in the nature of a clerical error or other honest mistake. *Id.* at 497.

[22] *Id.* at 498. The court ruled that the plaintiff had proved by a preponderance of the evidence that the defendant had acted in a wanton, malicious, and fraudulent nature, and in disregard of the rights of others. *Id.*

[23] *Id.* at 495. The Circuit Court of Smith County awarded the plaintiffs $100,000 in punitive damages and $1,820 in actual damages on the contract. *Id.* The plaintiff did not ask for any extracontractual damages such as emotional distress or economic loss. *Id.* at 498.

[24] *Id.* at 498. Six of the eight justices who decided the case joined in Justice Robertson's concurrence. *Id.* Only Justice Roy Noble Lee, C.J., and Justice Hawkins failed to join the concurrence. *Id.*

[25] *Id.*

[26] *Id.* (citations omitted).

[27] *Veal*, 354 So. 2d at 248. The court held that "[w]e are of the opinion that the refusal to pay the legitimate claim in this case was an intentional wrong and constituted an independent tort." *Id.* Thus the court held that punitive damages are not recoverable for breach of a contract unless such a breach is accompanied by such action which constitutes a tort. *Id.*

normal tort remedy extracontractual damages such as attorneys' fees and emotional damages may also be recovered in addition to actual contractual damages.[28] This seems to be a dramatic change for the Mississippi Supreme Court; numerous plaintiffs have advanced this theory of recovery,[29] but no Mississippi court has yet allowed recovery of damages such as emotional distress in connection with a bad faith insurance claim.[30]

II. Emotional Distress Damages

First, it should be noted that the damages herein discussed are not damages for the independent tort of intentional infliction of emotional distress,[31] but damages as an element of the independent tort of bad faith.[32] Mississippi originally followed the widely held "impact rule" which did not allow any recovery for emotional distress absent physical

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[28] *Maas*, 516 So. 2d at 498. Justice Robertson has written, "[W]hoever heard of a tort where the plaintiff was not entitled to recover such damages as he may prove caused by defendant's tortious conduct?" Pioneer Life Ins. Co. v. Moss, 513 So. 2d 927, 931 (Miss. 1987) (Robertson, J., concurring).

[29] *See* Life & Casualty Ins. Co. v. Bristow, 529 So. 2d 620, 624 (Miss. 1988) (court held that while extracontractual damages may be recovered in proper case, plaintiff had failed to prove the intent necessary to recover either punitive or extracontractual damages and also failed to prove actual emotional distress as connected to denial of his claim); Blue Cross & Blue Shield v. Campbell, 466 So. 2d 833, 844-45 (Miss. 1984) (court held that insurer did have arguable reason to deny plaintiff's claim but then discussed recoverability of extracontractual damages in light of past decisions which implied such rights; court held that "this is not the occasion for this Court to precipitately adopt some new concept on damages in the absence of a clear necessity and wisdom therefor.").

[30] Eichenseer v. Reserve Life Ins. Co., 682 F. Supp. 1355, 1364 (N.D. Miss. 1988). "Although the state supreme court has yet to directly decide the issue, several rulings have implied that such a remedy is available." *Id.* The court in *Eichenseer* affirmed an award of $1,000 for the plaintiff's emotional distress as a result of harm to her psyche, credit rating, and job performance because of on-the-job phone calls from collection agencies. *Id.* at 1373.

[31] Horton v. Hartford Life Ins. Co., 570 F. Supp. 1120, 1124 (N.D. Miss. 1983). Intentional infliction of emotional distress is a separate tort in which the plaintiff must show a wanton or shamefully gross wrong, outrageous conduct, or an act done maliciously, intentionally, or with such gross negligence or recklessness as to show indifference to the consequences. *Id.* at 1124. However, a bad faith plaintiff must prove the same elements in order to recover when he pleads such extracontractual damages as part of a bad faith breach of contract action. *Id.*; *see also* Freeland & Freeland, *supra* note 16, at 256-63 (1983) (general discussion of emotional distress damages for breach of insurance contract).

[32] *See* Pioneer Life Ins. Co. v. Moss, 513 So. 2d 927, 930 (Miss. 1987) (court distinguishes ordinary from heightened torts in context of bad faith denial of insurance claim and compares that cause of action to other intentional torts).

injury or suffering.[33] However, in the 1975 case of *First National Bank v. Langley*,[34] the Mississippi Supreme Court abolished the impact rule.[35] The court recognized a trend in allowing emotional distress damages without physical injury.[36] The court held that mental distress injuries "growing out of the negligent acts of another—which are reasonably foreseeable . . . will not be dismissed simply because there was no trauma nor impact on the body . . . ."[37] The court has further refined the state of the law in cases following the abolition of the impact rule.[38]

In the 1981 case of *Sears, Roebuck & Co. v. Devers*,[39] the Missis-

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[33] Western Union Tel. Co. v. Rogers, 68 Miss. 748, 759-60, 9 So. 823, 826 (1891). The Mississippi Supreme Court had ruled earlier that there could be no recovery for mental suffering. *Id.* at 753, 9 So. at 826. This continued to be the rule until it was seemingly abandoned in 1975. First Nat'l Bank v. Langley, 314 So. 2d 324 (Miss. 1975).

[34] 314 So. 2d 324 (Miss. 1975). The plaintiff made a deposit for his employer at the defendant's night deposit box. *Langley*, 314 So. 2d at 326. The deposit bag became hung in the box's opening mechanism, and was not recovered by the defendant bank due to a negligent inspection of the box. *Id.* The plaintiff came under suspicion by his employer and suffered anxiety attacks causing him later to become physically ill. *Id.* at 328. The bag was recovered, and the employee sued and recovered damages for mental suffering. *Id.* at 339.

[35] *Id.* at 339. The court concluded that there was no valid reason to continue to adhere to an "out-moded doctrine" which prevented recovery simply because the negligent party did not physically injure the plaintiff. *Id.* The court further stated, "[W]e, therefore, abandon the 'impact doctrine' heretofore followed by this Court, so that hereafter genuine cases of injury growing out of the negligent acts of another . . . will not be dismissed simply because there was no trauma nor impact on the body of the injured claimant." *Id.*

[38] *Id.* at 330-34. "After reviewing the numerous cases on the subject, there is no doubt that it is not only the modern trend, but also the weight of the majority of jurisdictions, that a physical impact is not required in order to recover for genuine physical consequences . . . or other mental distress . . . ." *Id.* at 334; *see also* Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709, 714 (1965) (prevailing principles of law as to negligence govern injuries from negligence-caused fright); Daley v. LaCroix, 384 Mich. 4, 179 N.W. 2d 390, 395 (1970) (plaintiff may recover for physical symptoms of emotional distress caused by defendant's negligence notwithstanding absence of physical impact on plaintiff at time of mental shock); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12, 13 (1965) (where defendant put plaintiff in fear for her safety she may recover for physical illness caused by mental anxiety absent physical impact); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 730 (1961) (overruled earlier case law prohibiting mental distress recovery absent physical impact).

[37] *Langley*, 314 So. 2d at 339.

[38] Aldridge v. Johnson, 318 So. 2d 870, 873 (Miss. 1975). The court acknowledged that the impact doctrine had been established but stated that there should be a requirement of "satisfactory proof." *Id.* at 873.

[39] 405 So. 2d 898 (Miss. 1981). Store customer was detained after a tag which had inadvertently been left on a sweater she had purchased set off the store's alarm. *Devers*,

sippi Supreme Court laid out the current state of the law in this area of damages.[40] The court stated that in order to recover in cases of ordinary or garden variety negligence, accompanying physical injury need not be shown, but there must be "resulting physical illness or assault upon the mind, personality or nervous system of the plaintiff which is medically cognizable and which requires or necessitates treatment by the medical profession . . . ."[41] The court further stated that where the defendant's conduct is willful, wanton, or intentional, there need be no physical injury or resulting physical illness because "it is the nature of the act itself—as opposed to the seriousness of the consequences—which gives impetus to legal redress."[42]

It is clear that there will normally be no accompanying physical injury in a bad faith insurance case. It is also very likely that there will be no resulting physical illness caused by the bad faith denial. Therefore most plaintiffs will have to rely on the second prong of available emotional distress damages: the intentional or willful and malicious conduct of the defendant without accompanying physical illness. This standard is the same standard necessary to prove the second element of the independent tort of bad faith, the heightened tort level of an intentional wrong or malicious and wanton conduct.[43] Therefore, the extracontractual damage pool of emotional distress will not be available unless the plaintiff can present enough proof to get a punitive damages instruction. Thus it is clear that emotional damages cannot be recovered from an insurer in the absence of a punitive damages award.[44]

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405 So. 2d at 899. Plaintiff suffered mental distress, anxiety, and crying spells, but never consulted a doctor or received medication. *Id.* She sued and recovered $4,300 from the defendant. *Id.* The Mississippi Supreme Court reversed the decision. *Id.* at 902.

[40] *Id.* at 901-02. The court stated the general rule that no mental distress damages are available in cases of ordinary negligence where there was no physical impact. *Id.* at 901. The court then acknowledged its holding in *Langley* which stated that such damages are recoverable absent physical injury if there is some physical or mental injury which was reasonably foreseeable from the defendant's conduct. *Id.* at 902. The court restated the original exception to the impact rule, that such damages are recoverable absent physical impact if the defendant's actions were intentional or wanton and malicious. *Id.*

[41] *Id.* at 902.

[42] *Id.*

[43] *Veal*, 354 So. 2d at 247. Punitive damages are not recoverable unless the defendant's actions were intentional, willful, wanton, malicious, grossly negligent, or recklessly negligent. *Id.*

[44] Life & Casualty Ins. Co. v. Bristow, 529 So. 2d 620, 624 (Miss. 1988). The court held that damages for mental anguish and emotional distress cannot be considered in absence of the finding of an independent intentional tort separate from the breach of contract. *Id.* at 624; *see also* Nichols v. Shelter Life Ins. Co., 694 F. Supp. 218, 220 (N.D.

The proof of the two damage elements is intertwined, and they are not available in the alternative. However, it should be stated at this point that proof of the intentional or malicious conduct of the defendant insurer is not enough to recover emotional distress damages by itself.[45] That proof relates only to the availability of such damages.

In order to recover emotional distress damages, the plaintiff must also prove that he or she actually suffered mental distress.[46] The standard of proof required is "satisfactory proof" of mental suffering and of pecuniary loss and physical illness if they are alleged.[47] Mere annoyance, mental anguish, or worry do not constitute recoverable elements of emotional distress damages.[48] Thus a plaintiff must first prove his bad faith case for punitive damages and then put on proof of actual emotional distress damages in order to be able to recover; that proof usually depends on lost wages due to missed work or inability to pay medical bills, which ruin credit and self-image.[49] Accordingly, while a new pool of damages has been opened to the bad faith plaintiff, it comes with a high burden of proof, and such damages may not be recovered in the absence of the recovery of punitive damages.

III. Attorneys' Fees

The rule of law has long been settled in Mississippi that attorneys' fees are not recoverable as an element of damages in a lawsuit unless one of three conditions is met.[50] Attorneys' fees are recoverable when

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Miss. 1988) (holding that plaintiffs can recover emotional distress damages only if they prove facts constituting bad faith).

[45] Bussen v. South Cent. Bell Tel. Co., 682 F. Supp. 319, 325 (S.D. Miss. 1987). Plaintiff must offer proof of damages for any emotional distress suffered. *Id.* at 325.

[46] *See supra* note 44.

[47] Aldridge v. Johnson, 318 So. 2d, 870, 873 (Miss. 1975). The court does not elaborate on or explain the term "satisfactory proof." *Id.*

[48] Gulf & S.I.R. Co. v. Beard, 129 Miss. 827, 834, 93 So. 357, 358 (1922). Although *Beard* was decided under the now abolished impact rule, the prohibition against recovery for mere annoyance, worry, or general anxiety appears to remain; the Mississippi Supreme Court has denied emotional distress damages to a plaintiff who suffered from anxiety and depression, but who did not consult a physician or acquire medication. *Bristow*, 529 So. 2d at 624.

[49] Eichenseer v. Reserve Life Ins. Co., 682 F. Supp. 1355, 1373 (N.D. Miss. 1988). Plaintiff was allowed to recover for harm to her credit rating and for the adverse affect on her job performance by collection agency telephone calls. *Id.*

[50] Hamilton v. Bradford, 502 F. Supp. 822, 836 (S.D. Miss. 1980). "This court is aware that in the absence of a statute or a contract provision, attorneys' fees are not recoverable unless the infliction of punitive damages is justified." *Id.*; *see* Bosco, *Insurance Companies—Exposure to Liability for Wrongful Treatment of Claimants*, 32 Trial Law. Guide 105, 116-17 (1988) (general rule is expenses of litigation are not recov-

their recovery is specifically provided for by a state statute,[51] when a private contract between the parties so provides,[52] or when punitive damages are justified.[53] This proposition was stated as early as 1859[54] and reaffirmed as recently as 1987.[55]

The court avoids the statute or contract requirement when awarding attorneys' fees in connection with punitive damages by way of its "inherent power to protect the integrity of their processes, and may impose sanctions in order to do so."[56] This power stems from the inherent power of the Mississippi Supreme Court to promulgate procedural rules which emanates from the constitutional concept of separation of powers and the vesting of judicial powers in the courts.[57] Therefore the fact that a bad faith plaintiff who recovers punitive damages may also recover reasonable attorneys' fees has been settled since *Veal*.[58] However, that is not the proposition forwarded in Robertson's concurrence in *Maas*.[59] Based upon the cases cited for the proposition in the *Maas* concurrence, it is clear that Justice Robertson intended to allow the recovery of attorneys' fees in cases in which the plaintiff merely recovered on his contractual claim, regardless of

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erable in most jurisdictions); Comment, *Award of Attorney Fees in Bad Faith Breaches of Contract in Louisiana—An Argument Against the American Rule*, 61 TUL. L. REV. 1173, 1187 (1987) (rare federal court-created exceptions to general rule of no recovery of attorneys' fees).

[51] Cooper v. United States Fidelity & Guar. Co., 186 Miss. 116, 122, 188 So. 6, 7 (Miss. 1939). As a general rule attorneys' fees are not available unless punitive damages are recoverable; however, this rule may be expressly excepted by a statute. *Id.*

[52] Grishman v. Hinton, 490 So. 2d 1201, 1206 (Miss. 1986). Parties may provide in their contract agreement that in case of a legal dispute, the losing party must pay the winning parties' attorneys' fees. *Id.*

[53] Aetna Casualty & Sur. Co. v. Steele, 373 So. 2d 797, 801 (Miss. 1979). "The rule in Mississippi is settled that punitive damages are not recoverable for a breach of contract unless such breach is attended by intentional wrong, insult, abuse, or gross negligence that amounts to an independent tort." *Id.*

[54] New Orleans, J. & G.N.R. Co. v. Allbritton, 38 Miss. 242, 242 (1859). The court held that where punitive damages are recoverable, the court costs and attorneys' fees can be recovered. *Id.*

[55] Central Bank v. Butler, 517 So. 2d 507, 512 (Miss. 1987). "Regarding attorneys' fees, this court has held that in the absence of contractual provisions or statutory authority, attorneys' fees may not be awarded as damages in a case unless punitive damages are also proper." *Id.* at 512.

[56] Ladner v. Ladner, 436 So. 2d 1366, 1370 (Miss. 1983).

[57] Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

[58] *Veal*, 354 So. 2d at 247; *see* Harrison v. Benefit Trust Life Ins. Co., 656 F. Supp. 304, 308 (N.D. Miss. 1987) (extracontractual damages, including attorneys' fees, are not recoverable in absence of punitive damages recovery).

[59] Blue Cross & Blue Shield v. Maas, 516 So. 2d 495, 498 (Miss. 1987).

whether he recovered punitive damages.[60] This proposition is contrary to all preceding Mississippi case law.[61] In a dissent in *Bankers Life & Casualty Co. v. Crenshaw*,[62] Justice Robertson stated: "I would hold as a rule of law that, *if* he prevails on his underlying contract claim, the insured without more becomes entitled to recover reasonable and necessary attorney's fees and legal expenses."[63] This represented a change in Justice Robertson's view from an earlier concurrence in *Blue Cross & Blue Shield v. Campbell*,[64] in which he basically stated the holding adopted in his *Maas* concurrence with the single difference that both elements of bad faith must be proved before attorneys' fees can be recovered.[65] Justice Robertson based this change on the underlying policy reasons for awarding attorneys' fees to a successful plaintiff. He stated the two basic policy reasons as being "where enforcement of important substantive rights by private action was being discouraged by the imposing cost of even successful litigation . . . or where imposition of the reasonable costs . . . upon a successful plaintiff would so substantially reduce a successful plaintiff's net recovery as to yield an apparent injustice . . . ."[66] Justice Robertson found authority for the court to award attorneys' fees in this manner in common law.[67] In *Grisham v. Hinton*,[68] Justice Robertson drew a parallel between statutes and case law by comparing the way they should be interpreted.[69]

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[60] Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 299 (Miss. 1985). Justice Robertson stated in a footnote that he had changed his view on the awarding of attorneys' fees and would not allow them to be awarded even when the plaintiff recovered only on the contract claim and failed to recover punitive damages. *Id.* at 299 n.18.

[61] Hamilton v. Bradford, 502 F. Supp. 822, 833 (S.D. Miss. 1980). There can be no nonstatutory recovery of attorneys' fees in absence of punitive damages. *Id.* The well established rule in Mississippi is that attorneys' fees are not recoverable unless the infliction of punitive damages is justified. Aetna Casualty & Sur. Co. v. Steele, 373 So. 2d 797, 801 (Miss. 1979).

[62] 483 So. 2d 254 (Miss. 1986).

[63] *Crenshaw*, 483 So. 2d at 299 n.18.

[64] 466 So. 2d at 833 (Miss. 1984).

[65] *Id.*

[66] *Crenshaw*, 483 So. 2d at 299. The numerous enactments by the legislature which allow for the recovery of attorneys' fees clearly demonstrate the implementation of the public policy of the state. *Id.* at 299.

[67] Grisham v. Hinton, 490 So. 2d 1201, 1208-09 (Miss. 1986). "There is no reason on principle why it should be thought we lack the authority to declare as a part of the common law of this state that attorneys fees and litigation expenses may be awarded in other proper contexts." *Id.* at 1208.

[68] *Id.* at 1208-09.

[69] *Id.* at 1209. Robertson stated that the same rules of common-law interpretation and expansion should apply with equal force to state statutes as to case law. *Id.* He characterizes the statutes as merely "points of departure." *Id.*

He stated that the undeniable phenomenon of the explosion of statutory law and privately made law authorizing recovery of attorneys' fees is a signal from the legislature and the people that the common law and case law are "lagging behind."[70] He stated, "That rules authorizing attorneys fees in other contexts are in statutory form places upon us an obligation that they be applied in analogous circumstances *greater* than were those rules mere common law rules."[71] He further stated:

> If the rules allowing awards of attorneys fees presently reposing in our statutes were instead found in cases, we would not hesitate to extend them to situations functionally analogous to those which gave rise to and fell within the coverage of those rules. Such is the nature of the common law process.[72]

Thus Justice Robertson made it clear that he believes that a bad faith plaintiff should be able to recover his reasonable attorneys' fees in all cases where he is successful in prosecuting his contractual claim for actual damages, regardless of whether the heightened tort of bad faith and thus punitive damages has been proven.[73] However, this interpretation is determined only by a composite reading of several of Justice Robertson's opinions[74] and is not clear from just a reading of his *Maas* concurrence. Five other Justices joined Justice Robertson in his *Maas* concurrence, making it case law authority, but it is unclear if those five Justices agreed with Justice Robertson's view on the award of attorneys' fees as simply stated in *Maas* or as discerned from several recent

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[70] *Id.* at 1209 n.2; *see* MISS. CODE ANN. § 11-31-2(3)(c) (Supp. 1989) (attachment brought in bad faith; attorney' fees recoverable); MISS. CODE ANN. § 11-53-81 (Supp. 1989) (attorney's fees recoverable in open account suits); MISS. CODE ANN. § 75-9-504(1)(a) (1972) (disposition of collateral after default; attorneys' fees recoverable by secured party); MISS. CODE ANN. § 75-9-506 (1972) (attorneys' fees recoverable by secured party if debtor redeems collateral); MISS. CODE ANN. § 75-24-15(2) (Supp. 1985) (violator of consumer protection laws must pay attorneys' fees); MISS. CODE ANN. § 75-71-717 (Supp. 1985) (party who purchases illegal or fraudulent securities may recover attorneys' fees); MISS. CODE ANN. § 83-21-51 (1972) (attorneys' fees recoverable against foreign insurance companies for bad faith).

[71] *Grisham*, 490 So. 2d at 1209.

[72] *Id.*

[73] Banker's Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 299 n.18 (Miss. 1985).

[74] *See* Grisham v. Hinton, 490 So. 2d 1201, 1208-09 (Miss. 1986) (Robertson believes that supreme court has authority based on common-law interpretation to provide for attorneys' fees even when bad faith plaintiff fails on his punitive damage claim); *Crenshaw*, 483 So. 2d at 298-99. (Justice Robertson suggests as rule of law that bad faith plaintiffs be able to recover attorneys' fees regardless of their ability to recover punitive damages).

Robertson decisions.[75] No cases have gone before the supreme court since *Maas*, in which the plaintiff sought attorneys' fees in a case where he was successful on the contract claim for actual damages and unsuccessful on the independent tort of bad faith claim for punitive damages.

IV. Economic Losses

In a typical tort action, a plaintiff may recover all economic damages which are a proximate result of the defendant's tortious conduct.[76] However, in the case of the independent tort of bad faith, a plaintiff has been limited to actual contractual damages and punitive damages, with no possible recovery for economic hardship caused by the wrongful denial of a legitimate claim.[77] The numerous economic hardships which may result from a wrongful denial of an insurance claim, an uncompensated loss, include: loss of income, loss of the use of the property, loss of credit, interest on loans taken out to pay expenses, legal expenses incurred defending suits by creditors, loss of good will and reputation, loss of employment opportunities; and in a worse-case scenario, delay or denial of a legitimate claim may result in bankruptcy for the plaintiff.[78] All of these have been held to be correct elements of consequential damages in bad faith cases in other jurisdictions.[79]

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[75] Blue Cross & Blue Shield v. Maas 516 So. 2d 495, 498 (Miss. 1987). Robertson's concurrence provides for the recovery of attorneys' fees as part of extracontractual damages, but the concurrence provides no standards to govern such recovery. *Id.*

[76] *See* Dogan v. Hardy, 587 F. Supp. 967, 970 (N.D. Miss. 1984) (effect of tortious injury on earning capacity may be considered by jury); Cook Indus., Inc. v. Carlson, 334 F. Supp. 809, 816 (N.D. Miss. 1971) (lost profits may be considered as element of tort damages).

[77] Standard Life Ins. v. Veal, 354 So. 2d 239, 247 (Miss. 1977). Plaintiff was allowed to recover the amount due under the contract and a punitive damage award to punish the insurance company but no discussion of extracontractual compensatory damages was made. *Id.* at 247-49.

[78] Speech by Justice James L. Robertson to CLE seminar (1988) (discussing recovery of extracontractual tort damages in bad faith refusal litigation), *reprinted in* W. Walker, Mississippi Bad Faith 87, 96-97 (1988).

[79] *See* Payne v. Nationwide Mut. Ins. Co., 456 So. 2d 34, 35 (Ala. 1984) (economic loss and emotional distress damages allowed as proper part of damage pleading); Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1, 7 (Ala. 1981) (court held that mental distress damages and economic loss were recoverable in bad faith action); Neal v. Farmers Ins. Exch., 21 Cal. 3d 925, 927, 148 Cal. Rptr. 389, 398, 582 P. 2d 980, 989 (1978) (compensatory damages are recoverable but must be segregated from contractual damages in verdict); Lloyds of London v. Lock, 454 N.E.2d 81, 83 (Ind. Ct. App. 1981) (compensatory damages including economic loss such as lost profits are recoverable in bad faith action); Drop Anchor Realty v. Hartford Fire Ins. Co., 496 A.2d 339, 342-43 (N.H.

In his concurrence in *Maas*, Justice Robertson stated that the plaintiff should be able to recover, when pleaded and proved, "the following damages: (1) economic losses incurred as a proximate result of the insurer's tortious conduct . . . ."[80] He further clarified this statement by stating that these economic damages included, and thus were not limited to, attorneys' fees and legal expenses.[81] Thus the possible confusion as to the standard under which the recovery of attorneys' fees is available does not exist as to normal economic damages. As stated by Justice Robertson in *Pioneer Life Insurance Co. v. Moss*,[82] "[t]here is not one word in our law that precludes a plaintiff in a bad faith refusal case recovering ordinary tort damages assuming, of course, proper proof."[83] At this time only three other justices joined with Robertson.[84]

While there is no case law which prevents the awarding of economic loss damages in connection with the independent tort of bad faith, there is also no authority which expressly allows such an award. Justice Robertson appears to infer that these damages are available for every other tort, and since there is no express prohibition in awarding them in regard to bad faith, then they are recoverable. He relies on *Travelers Indemnity Co. v. Wetherbee*[85] for the implied authority to

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1985) (compensatory damages for economic loss may properly include loss of good will and business reputation, although plaintiff failed to prove those damages); Smith v. American Family Mut. Ins. Co., 294 N.W. 2d 751, 761 (N.D. 1980) (damages for emotional distress are proper in action for bad faith even in absence of impact); *see also* Callahan, *Some Thoughts on the Avoidance of Extracontractual Damages in California Insurance Litigation*, 14 W. ST. U.L. REV. 73, 74 (1986-87) (discussion of numerous California cases awarding emotional distress damages); Fanning, *Bad Faith and Other Extracontractual Actions Against Insurers*, 1985 FOR DEF. 11, 11-17 (1985) (discussion of development of California bad faith law in relation to extracontractual damages); Comment, *Bad Faith: Limiting Insurer's Extracontractual Liability in Texas*, 41 SW. L.J. 719, 721-22 (1987-88) (discussing availability of extracontractual damages in Texas case law).

[80] Blue Cross & Blue Shield v. Maas, 516 So. 2d 495, 498 (Miss. 1987).

[81] *Id.*

[82] 513 So. 2d 927 (Miss. 1987).

[83] *Moss*, 513 So. 2d at 931. This quoted statement was recorded in 1987 and appears to remain true today. *Id.*

[84] *Id.* Justice Robertson's special concurrence was joined by Justices Prather and Anderson. *Id.*

[85] 368 So. 2d 829, 836 (Miss. 1979). Plaintiff filed a claim with the defendant for the fire loss of his insured home. *Travelers*, 368 So. 2d at 830. Defendant insurer refused because it suspected claimant of arson. *Id.* Claimant was exonerated of arson and sued insurer. *Id.* The supreme court in this case recognized the difference between actual contractual damages and extracontractual compensatory damages but did not reach the question of whether such extracontractual damages could be properly awarded. *Id.* at

award such damages. The trial court in *Travelers* had granted a jury instruction in compensatory damages that would include emotional distress and economic damages for tortious breach of contract, and the jury returned an award in both areas.[86] The Mississippi Supreme Court disallowed the recovery for emotional distress but recognized the difference between actual contractual damages and compensatory extracontractual damages.[87] The court allowed a portion of the extracontractual damages to stand, as it found that they were actually part of the proceeds of the policy.[88] The court disallowed the remainder of the damages because there was no "competent evidence".[89] At the end of this analysis, the court stated, "[s]ince this is so, we do not reach the question of whether actual damages for tortious breach of contract may be properly awarded in addition to punitive damages arising from an independent tort and the proceeds of the policy."[90] The six justices who joined in the *Maas* concurrence appear to have answered in the affirmative the question of whether economic loss damages are recoverable in a bad faith case.

V. Post-*Maas* Mississippi Case Law

The *Maas* case was decided in December, 1987, with rehearing denied in January, 1988.[91] Mississippi courts have had very few opportunities to apply the *Maas* holding since that time. The first case to do so was *Eichenseer v. Reserve Life Insurance Co.*[92] In *Eichenseer*, Judge

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836.

[86] *Id.* at 833. The jury in *Travelers* awarded the plaintiff $50,000 in compensatory damages with no distinction between contractual and extracontractual and $50,000 in punitive damages. *Id.*

[87] *Id.* at 836. The supreme court did not allow the claimant to recover for fear, anxiety and emotional distress. *Id.* The court did, however, recognize the difference between contractual and extracontractual compensatory damages. *Id.*

[88] *Id.* The supreme court allowed the contract based part of the compensatory damages to stand, $27,500 of the original award of $50,000. *Id.* The $27,500 included $20,000 for the dwelling, $6,000 for contents and $1,500 additional living expenses, all as provided for in the insurance contract. *Id.*

[89] *Id.* The remainder of the compensatory evidence was struck down due to the lack of competent evidence. *Id.* This strategy allowed the court to avoid directly answering the question of whether extracontractual compensatory damages were recoverable in a bad faith action. *Id.*

[90] *Id.*

[91] Blue Cross & Blue Shield v. Maas, 516 So. 2d 495, 498 (Miss. 1987).

[92] 682 F. Supp. 1355 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *reh'g denied*, No. 88-4421 (5th Cir. Feb. 9, 1990). Claimant filed her medical expenses with the defendant insurer for a complete hysterectomy she had undergone. *Eichenseer*, 682 F. Supp. at 1357. Insurer denied the claim, reasoning falsely that her condition was caused

Senter held that a bad faith claimant may recover extracontractual (tort) compensatory damages, when properly pleaded and proved, if the insurer acted without an arguable reason and in bad faith.[93] Judge Senter stated no direct case authority for this decision, but appeared to rely on the *Maas* decision, which held that compensatory damages such as attorneys' fees and emotional damages could be considered as components of the economic loss tort damages in a bad faith claim, or as separate and distinct awards required by law.[94] The Northern District Court was clearly struggling with the possible new sources of recovery in bad faith cases. The court held that the plaintiff was entitled to $500,000 in punitive damages and $1,000 in extracontractual compensatory damages.[95] The $1,000 was awarded for emotional distress and foreseeable economic losses based upon harassment by collection agencies, the adverse effect on her credit rating, and the adverse effect on her job performance.[96] The plaintiff did not plead for attorneys' fees.[97]

Shortly after *Eichenseer*, the Mississippi Supreme Court again addressed these issues in July, 1988, in the case of *Life & Casualty Insurance Co. v. Bristow*.[98] The trial court had awarded the plaintiff $50,000 in compensatory damages for emotional distress.[99] The supreme court, relying on the *Maas* concurrence, held that such damages are available

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by a preexisting illness. *Id.* at 1358. The federal court found that the insurer had acted with gross and reckless negligence. *Id.* at 1372.

[93] *Id.* at 1373.

[94] *Maas*, 516 So. 2d at 498.

[95] *Eichenseer*, 682 F. Supp. at 1373-74.

[96] *Id.* at 1373.

[97] *Id.* The court stated that, assuming it had the authority to award attorneys' fees and litigation costs, it would not have awarded them in light of the large punitive damage award. *Id.* at 1373-74. The court further stated that this would not be the rule for all bad faith cases, but would simply be the court's course of action in this case. *Id.* at 1374.

[98] 529 So. 2d 620 (Miss. 1988), *cert. denied*, 109 S. Ct. 794 (1989). Claimant, an electrician, broke his arm and filed a claim on his disability policy issued by the defendant insurer. *Bristow*, 529 So. 2d at 621. The policy provided for total disability payments as long as the claimant could not perform any duty of any occupation for which he was reasonably fitted by his education, training, and experience. *Id.* The claimant's doctor prohibited him from working as an electrician, but not at other employment where there was no heavy manual labor or overhead work. *Id.* at 622. Based on the doctor's recommendation, the insurer ceased disability payments and filed a declaratory judgment action in which the claimant counterclaimed for bad faith. *Id.*

[99] *Id.* at 624. The jury in the Circuit Court of Lee County returned a verdict for $50,000 actual damages and $6,000,000 in punitive damages. *Id.* at 622. The $50,000 award was based on the plaintiff's claim for emotional distress damages. *Id.*

in a bad faith denial case.[100] However, the court found that while the plaintiff had met his burden of proof as to wrongful denial, he had not met his *Maas* burden of proof for emotional distress damages by showing the intentional nature of the denial.[101] The court also found the plaintiff's proof of actual emotional distress to be insufficient.[102] Thus the court recognized the holding of the *Maas* concurrence as the current state of Mississippi law on extracontractual damages in a bad faith case, even though the plaintiff failed to meet the necessary standards.

Subsequently, the same court again relied on the *Maas* concurrence in the case of *Mattox v. Western Fidelity Insurance Co.*[103] Judge Senter stated, "Extracontractual compensatory damages are available under Mississippi law for tortious breach of contract including 'economic losses incurred as a proximate result of the insurer's tortious conduct and emotional distress damages.' "[104] The court relied solely on the *Maas* concurrence as authority for this proposition.[105] However, the court also found that the plaintiff's proof of difficulty in sleeping was in itself insufficient to recover emotional distress damages.[106]

Finally, in the case of *Nichols v. Shelter Life Insurance Co.*[107] the same court affirmed without doubt the availability of emotional dis-

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[100] *Id.* at 624. The court found that damages for mental anguish and emotional upset may be recovered when the plaintiff can prove an intentional or grossly negligent element of the bad faith breach. *Id.*

[101] *Id.* The court found that the plaintiff had not met his burden of proof in proving the intentional or grossly negligent manner of the defendant's denial of his claim. *Id.*

[102] *Id.* Even if he had passed the evidentiary threshold, the plaintiff's proof of actual emotional distress damages was insufficient. *Id.* Plaintiff's only proof was his wife's testimony that he had become moody and worried. *Id.*

[103] 694 F. Supp. 210 (N.D. Miss. 1988). Plaintiff made a claim on his major medical insurance policy following his wife's hospitalization for leukemia. *Mattox*, 694 F. Supp. at 213. The defendant insurer denied the claim due to material misrepresentations in the policy application with regard to doctors who had been seen in the past, current state of health, and denial of the existence of high blood pressure in the wife. *Id.* at 214-15. The claimant filed suit for bad faith, but the federal court left the issue of whether the insurance company had acted intentionally or in gross negligence to the jury, rather than granting summary judgment. *Id.* at 217.

[104] *Id.* at 217 (quoting Blue Cross & Blue Shield v. Maas, 516 So. 2d 495, 498 (Miss. 1987) (Robertson, J., concurring)).

[105] *Id.* at 217. The court quoted *Maas* and cited it as sole authority for the recovery of extracontractual damages in Mississippi bad faith actions. *Id.*

[106] *Id.* The court found the plaintiff's evidence of difficulty sleeping at night, unsupported by any other evidence, insufficient to warrant the recovery of emotional distress damages on summary judgment. *Id.*

[107] 694 F. Supp. 218 (N.D. Miss. 1988).

tress damages in a bad faith case.[108] In *Nichols*, the defendant had submitted a motion to dismiss as to the plaintiffs' claim for extracontractual emotional damages.[109] The defendant cited pre-*Maas* cases as authority for this motion.[110] The court, relying wholly on *Maas*, stated, "The court considers the question settled in the plaintiffs' favor. If they can prove at trial facts constituting 'bad faith,' these plaintiffs can recover for any emotional distress that they suffered as a result of the company's tortious acts."[111] Thus the district court appeared to view all prior authority which precluded recovery of extracontractual damages in bad faith cases as overruled by the six-justice concurrence in *Maas*.

The latest case to address the *Maas* concurrence is *Vowell v. Physicians Mutual Life Insurance Co.*, decided in April, 1989.[112] In *Vowell*, the plaintiff conceded her punitive damages claim but continued to claim extracontractual damages.[113] The district court, relying on the *Maas* concurrence, concluded that extracontractual damages may be awarded in the absence of punitive damages, as they are separate and apart from an award of punitive damages and are actually ordinary tort damages.[114] However, the court refused to award extracontractual damages because of the lack of a provision for an intermediate standard in *Maas*.[115] The court refused to make an *Erie*[116] guess as to

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[108] *Nichols*, 694 F. Supp. at 220. Plaintiff claimant purchased a major medical policy from the agent of the defendant insurer, in part due to the representation by that agent that a recently removed tumor would not be treated as a preexisting condition. *Id.* at 219. After the policy was in force, another cancerous tumor was discovered and treated with chemotherapy. *Id.* Plaintiff submitted a claim for the hospital expenses, which the defendant insurer refused to pay. *Id.* The claimant filed a bad faith suit for contract damages, emotional distress, and punitive damages. *Id.* at 219-20.

[109] *Id.* at 219. The defendant argued first and foremost that there was no covered loss and thus no duty to pay, and in the alternative that extracontractual damages were unavailable, and that punitive damages were inappropriate. *Id.* at 219-20.

[110] *Id.* at 220. The defendant cited a case which states that extracontractual damages are not authorized by statute or case law. State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 250 (Miss. 1985). The federal court found that the concurrence in *Maas* is direct authority on the matter and settled the question in favor of the plaintiff. *Nichols*, 694 F. Supp. at 220.

[111] *Nichols*, 694 F. Supp. at 220.

[112] 711 F. Supp. 318 (N.D. Miss. 1989). Plaintiff filed a claim on a life insurance policy based on the shooting death of her husband during a family altercation. *Vowell*, 711 F. Supp. at 319.

[113] *Id.* at 322. The insurance company had an arguable reason to dispute the "accidental death" of the deceased. *Id.* Plaintiff claimed general extracontractual damages without naming the specific elements. *Id.*

[114] *Id.* at 323.

[115] *Id.* at 323 & n.1.

whether the standards advocated by Justice Robertson in his *Crenshaw* dissent were adopted by the Mississippi Supreme Court in the *Maas* concurrence or whether another undiscussed standard was to be applied.[117] The court was reluctant to make such a guess in an area of "great advancement in this important area of the law."[118]

Conclusion

Prior to December 9, 1987,[119] extracontractual damages were not available to bad faith claimants in Mississippi.[120] Such plaintiffs were limited to actual contract damages and punitive damages.[121] On December 9th, Justice Robertson enunciated this new facet of recovery for bad faith claimants[122] which he had advocated in numerous prior concurrences[123] and dissents.[124] However, on this occasion, his theory swayed five other supreme court justices; and thus the law was changed. Rarely does the essential nature of such causes of action change so abruptly and in such a drastic manner. However, since this theory was stated in a very brief concurrence, exactly what weight the opinion carries remains unclear, as do exactly what standards have to be met. The few cases which have been decided in this area subsequent to *Maas* make it clear that the concurrence carries the full weight of the court, although the standards necessary for recovery remain unclear.[125] It appears from the reading of several opinions that the intentional nature of the heightened tort, plus actual emotional distress and

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[116] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1937).

[117] *Id.* at 323 n.1. The plaintiff had not presented any proposed standards or tests for the recovery of extracontractual damages, and the court would not devise them itself. *Id.*

[118] *Id.*

[119] *Maas*, 516 So. 2d at 498.

[120] Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1977). Plaintiffs in bad faith claim limited to actual contract damages and punitive damages. *Id.*

[121] *See supra* note 13 and accompanying text.

[122] *Maas*, 516 So. 2d at 498. Plaintiffs may now recover, upon the proper showing of proof, economic losses, attorneys' fees and emotional distress. *Id.*

[123] *See* Pioneer Life Ins. Co. v. Moss, 513 So. 2d 927, 931 (Miss. 1987) (Justice Robertson calling for ordinary tort damages to be allowed in bad faith independent tort cases); Grisham v. Hinton, 490 So. 2d, 1201, 1208-09 (Miss. 1986) (Justice Robertson relying on use of common-law theories to give supreme court authority to award attorney's fees in bad faith cases); *Campbell*, 466 So. 2d 845, 844. (Justice Robertson arguing for extracontractual damages in bad faith cases).

[124] *See* Banker's Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 282, 299 (Miss. 1985). (Justice Robertson arguing for awarding of attorneys' fees in cases where bad faith plaintiff fails on bad faith claim, but does recover actual contract damages).

[125] *See* cases cited *supra* notes 92-107.

resulting damages, must be proved in order to claim emotional distress damages; in addition, wrongful denial must be proved in order to claim attorneys' fees and economic loss. Thus, while punitive damages in bad faith cases continue to come under attack, a new category of damages has been made available. It is unlikely, however, that this new facet of recovery will be abused because of the high burden of proof imposed; the recovery of such damages in the proper cases will be in the best interest of equity and justice.

Michael D. Herrin

RECENT DECISIONS

CONSTITUTIONAL LAW — SIXTH AMENDMENT — CONFRONTATION CLAUSE EXPLICITLY PROVIDES DEFENDANT FACE-TO-FACE MEETING WITH HIS ACCUSERS*

Then call them to our presence; face to face and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.

William Shakespeare[1]

The State of Iowa[2] prosecuted[3] the appellant[4] for two counts of

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* Best 1988 student-written casenote. Award by Ott & Purdy, Ltd., Jackson, Mississippi.

[1] SHAKESPEARE, RICHARD II, Act. 1, sc. 1 (1595).

[2] Coy v. Iowa, 108 S. Ct. 2798 (1988).

[3] State v. Coy, 397 N.W.2d 730, 730 (Iowa 1986), *rev'd*, 108 S. Ct. 2798 (1988). The prosecution alleged that the appellant was guilty of engaging in lascivious acts with a child in violation of IOWA CODE § 709.8(1) (1985). *Coy*, 397 N.W.2d at 730.

[4] *Coy*, 397 N.W.2d at 730. On August 3, 1985, two young girls were sexually assaulted while camping out in the back yard of one of the girls. *Id.* According to the plaintiff's Supreme Court brief, the defendant, John Avery Coy, lived in a residential neighborhood with his girl friend next door to one of the victims; and on the afternoon of August 2, 1985, while sitting in a lawn chair in his back yard, he watched one of the 13-year-old victims prepare a camp site in her back yard. Brief for Appellee at 3, Coy v. Iowa, 108 S. Ct. 2798 (1988) (No. 86-6757). The tent was not visible from the street; however, it was visible from the defendant Coy's home. *Id.* The two 13-year-old victims went to sleep around 10:00 or 11:00 p.m. *Id.* Some time during the night, a man crawled into the tent. *Id.* He grabbed the girls by their throats and threatened them. *Id.* The two girls were ordered to remove their clothes except for their underwear. *Id.* The man proceeded to sexually assault the girls by fondling their breasts and vaginal areas. *Id.* He removed their underwear and placed those items in a plastic bag. *Id.* The man then ordered the girls to perform oral sex on him and to kiss each other. *Id.* He also urinated

sexual abuse of a child.[5] The trial court[6] overruled the appellant's objection[7] and approved the use of a one-way screen[8] erected between the

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into one of the cups which the girls had brought to the tent. *Id.* After warning the girls not to tell anyone what had happened, the attacker then tied the girls up with their own clothing. *Id.*

The girls managed to free themselves and went into the house to report to the parent of one of the girls what had occurred. *Id.* The police were notified, and the girls were taken to the hospital for an examination. *Id.* The father of one of the girls told the police that he suspected Coy, and Coy was arrested. *Id.* However, the girls could not identify their attacker because at the time of the assault, he was wearing a nylon-type stocking over his head. *Id.* The girls' flashlight with Coy's fingerprints was found in Coy's garage, and the cup into which the attacker had urinated was found in the garbage just outside Coy's back door. *Id.* at 5. However, as asserted by the defendant in his brief to the Supreme Court, the investigators who searched his house found neither the mask, the clothing that matched the description given by the girls, nor the girls' panties which had been placed in a white bag and taken by the attacker. Brief for Appellant at 8, Coy v. Iowa, 108 S. Ct. 2798 (1988) (No. 86-6756). The girls also told investigators that after the man left their tent, they heard what sounded like a motorcycle start up and leave. *Id.* Coy, the defendant, did not own a motorcycle, nor had he operated one in the neighborhood. *Id.*

[5] IOWA CODE § 709.8(1) (1985) provides in part:

> It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without his consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:
>
> 1. Fondle or touch the pubes or genitals of a child.
>
> 2. Permit or cause a child to fondle or touch the person's genitals or pubes. . . .
>
> Any person who violates a provision of this section shall upon conviction be guilty of a class "D" felony.

Id.

[6] *Coy*, 397 N.W.2d at 730. Judge L.D. Carstensen presided. *Id.*

[7] *Coy*, 108 S. Ct. at 2799. The appellant argued that the use of the screen violated his right to a face-to-face confrontation with adverse witnesses in a criminal proceeding. *Id.* Specifically, Coy objected to the state's motion to allow the girls to testify either via closed-circuit television or behind a screen. *Id.* As argued by Coy in his Supreme Court brief, he based his objection to the screen on the fact that the girls could not identify him as their attacker; therefore the screen violated his sixth amendment right to confront the witnesses against him. Brief for Appellant at 3-4. He also contended that the screen created an inference of guilt which violated his fourteenth amendment right to a fair trial. *Coy*, 108 S. Ct. at 2799. The fourteenth amendment provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1.

[8] *Coy*, 108 S. Ct. at 2799. The State of Iowa made a motion to allow the girls to testify either via closed-circuit television or behind a screen pursuant to the recently enacted Act of May 23, 1985, § 6, 1985 IOWA ACTS 338 (codified at IOWA CODE § 910A.14 (Supp. 1989)). *Id.* The Act provides in part as follows:

> The court may require [that] a party be confined [sic] to an adjacent room or

appellant and the witness stand during the victims' testimony.[9] The jury returned a guilty verdict against appellant on both charges.[10] The Iowa Supreme Court affirmed appellant's conviction.[11] On appeal,[12] the

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behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during the testimony.

IOWA CODE § 910A.14 (Supp. 1989).

[9] *Coy*, 397 N.W.2d at 733. The court rejected the state's motion to use the closed-circuit television option under the statute but permitted a screen to be employed during the victim's testimony at trial. Brief for Appellant at 4. During the girls' testimony, the lighting in the courtroom was dimmed and a one-way screen was placed between the appellant and the testifying witnesses. Brief for Appellee at 9-10. The screen allowed the appellant both to hear and dimly view the girls as they testified, however; the witnesses were only able to hear the defendant. Brief for Appellant at 5-6. The screen was positioned to allow the remaining courtroom audience, including the judge, jury and onlookers, to see and hear the witnesses as well as the appellant. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting). The witnesses were informed that the defendant could see and hear them while they were on the witness stand. *Id.* (Blackmun, J., dissenting). The trial judge on two occasions instructed the jury that the screen placed between the testifying witnesses and the appellant was allowed under recently enacted Iowa law. Brief for Appellee at 11-12.

[10] *Coy*, 108 S. Ct. at 2799-800. Both of the girls testified with the screen blocking their view of the appellant. Brief for Appellant at 7. After the girls testified and at the close of the state's case, the appellant moved for a mistrial, claiming that the screening device had a prejudicial impact upon the trial. *Id.* The motion was overruled by the trial judge. *Id.* The appellant was convicted on two counts of engaging in lascivious acts with a child under IOWA CODE § 709.8(1) (1985). *Coy*, 108 S. Ct. at 2800.

[11] *Coy*, 108 S. Ct. at 2800. On appeal, the appellant contended that the screen used under the Iowa statute violated his confrontation right provided by the sixth amendment. *Id.* Coy argued that the trial court erred by not first finding that the screen used at trial was necessary. *Coy*, 397 N.W.2d at 730. Coy additionally argued that the screen was inherently prejudicial and violated his right to a fair trial as guaranteed to state court defendants by the fourteenth amendment. *Coy*, 108 S. Ct. at 2800. The Iowa Supreme Court affirmed the trial court's conviction of Coy and held that a finding of necessity in using the statutorily prescribed screen at trial was not constitutionally required since the appellant's confrontation rights were not violated by such a procedure. *Coy*, 397 N.W.2d at 733-34. The court reasoned that the screen did not impede the appellant's opportunity to cross-examine the witnesses and therefore no confrontation clause violation occurred. *Coy*, 108 S. Ct. at 2800. The court also held that the screen was not inherently prejudicial, and therefore the appellant was not denied a fair trial as guaranteed to defendants in state criminal trials by the due process provision of the fourteenth amendment. *Coy*, 397 N.W.2d at 735.

[12] *Coy*, 108 S. Ct. at 2800. Coy appealed his conviction to the United States Supreme Court and argued in his brief that the use of the screen was a violation of both his fourteenth amendment right to a fair trial and his sixth amendment confrontation right. Brief for Appellant at 11. Coy once again stressed as error the state's failure to show that

United States Supreme Court, *held*, reversed and remanded.[13] Where a state statute approved the use of a screen to be placed between the appellant and testifying witness, and where there was no individualized finding that the appellant's confrontation interest was outweighed by the necessity of protecting the witnesses, then the appellant's right to a face-to-face encounter with witnesses as provided by the literal requirement of the confrontation clause of the sixth amendment was vio-

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the screen served an essential state interest. *Id.* Coy additionally asserted that the Iowa Supreme Court's error was not harmless and therefore required reversal. *Id.* at 41.

[13] *Coy*, 108 S. Ct. at 2803. The United States Supreme Court rejected the Iowa Supreme Court's ruling and reversed the conviction of the appellant. *Id.* The majority opinion, delivered by Justice Scalia, stated that the appellant's sixth amendment confrontation right was violated since the confrontation clause guarantees a criminal defendant a face-to-face confrontation with witnesses. *Id.* at 2800. The Court found that because the violation of the appellant's confrontation right required that the lower court's conviction of the appellant be reversed, it was unnecessary to discuss the appellant's due process claim. *Id.* at 2803.

Justice O'Connor filed a concurring opinion in which she agreed with the majority opinion that the appellant's sixth amendment confrontation right was violated by the use of the screen at trial. *Id.* (O'Connor, J., concurring). Justice O'Connor stated, however, that there was only a "preference" for face-to-face confrontation, and like other elements of the confrontation clause, it was subject to exceptions, especially when important competing interests were present. *Id.* at 2805. Justice O'Connor asserted that "in an appropriate case . . . procedural devices designed to shield a child witness from the trauma of courtroom testimony" may be employed. *Id.* at 2803.

Justice Blackmun wrote a dissenting opinion in which he concluded that the confrontation clause of the sixth amendment did not mandate face-to-face confrontation, rather it indicated " 'a preference for face-to-face confrontation at trial.' " *Id.* at 2808 (Blackmun, J., dissenting) (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)). The dissent stated that such a preference for face-to-face confrontation was subject to exceptions, especially where essential state interests were concerned. *Id.* Justice Blackmun reasoned that the protection of child witnesses qualified as such an important state interest and outweighed the constitutional "preference" for face-to-face confrontation. *Id.* at 2809.

The Court remanded the case in order that the lower court might make a determination of whether the confrontation right violations were harmless error. *Id.* at 2803. The Court recognized that the defendant's confrontation right violation was, like some other constitutional error, subject to harmless error analysis. *Id.*; *see* Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (holding that where defendant was denied opportunity to impeach witness for bias, like other confrontation clause errors, it was subject to harmless error analysis); Chapman v. California, 386 U.S. 18, 24 (rejecting argument that all federal constitutional errors require reversal of judgment of conviction), *reh'g denied*, 386 U.S. 987 (1967). In *Van Arsdall*, the Court explained that the Constitution provided the defendant the right to a fair, but not a perfect, trial. *Van Arsdall*, 475 U.S. at 681. Therefore, certain errors may be "harmless" in their effect upon the fact-finding process. *Id.* In such cases, "an otherwise valid conviction" should stand if upon remand the Court makes a determination that "on the whole record . . . the constitutional error was harmless beyond a reasonable doubt." *Id.*

lated. *Coy v. Iowa*, 108 S. Ct. 2798 (1988).

The history of the constitutionally protected right to confrontation,[14] as part of our tradition of fair play and means of determining the truth, can be traced to Biblical times.[15] By the beginning of the eighteenth century, the idea that the accused had a right to confront and cross-examine all adverse witnesses won a place in the American colonies,[16] and some seventy-five years later the right attained constitutional status.[17] In the early case of *Mattox v. United States*,[18] the United States Supreme Court confronted the question of whether to allow the prosecution to read into the record the testimony presented at a previous trial[19] by government witnesses who had since died.[20] The defendant contended that to do so was a violation of his right to confront and cross-examine[21] adverse witnesses, but the Supreme Court

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[14] U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.*

[15] *See Acts* 25:16. Over two thousand years ago, a Roman prisoner named Paul was brought before the Roman Governor Festus. *Id.* Festus stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face . . . ." *Id.* In the majority opinion, Justice Scalia referred to this biblical passage that the accused must be allowed to meet his accusers "face to face." *Coy*, 108 S. Ct. at 2800. In addition, Justice Scalia noted that the history of allowing the defendant the right of confrontation predated the right to a jury trial in England. *Id.*; *see* Greene v. McElroy, 360 U.S. 474, 496 n.25 (1959) (Court stated that bifurcated rights of confrontation and cross-examination had ancient roots in Rome more than two thousand years ago). *See generally* Pollit, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-85 (1959) (discussion of right of accused to confront adverse witnesses as it existed in England even before right to trial by jury).

[16] F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104 (1951). The right of a defendant to confront a complaining witness gained recognition through the trial of Sir Walter Raleigh, who was found guilty of treason after a trial by affidavit. *Id.*; *see* United States v. Inadi, 475 U.S. 387, 411 (1986) (Marshall, J., dissenting) (plight of Sir Walter Raleigh, condemned on deposition of alleged accomplice who had since recanted, may have loomed large in eyes of those drafting sixth amendment constitutional guarantee); *see also* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 99 (1972) (government failed to produce live witnesses in conviction of accused for treason).

[17] U.S. CONST. amend. VI. *See generally* Pollit, *supra* note 15, at 399 (states' refusal to ratify Constitution without inclusion of Bill of Rights).

[18] 156 U.S. 237 (1895).

[19] *Mattox*, 156 U.S. at 238. In the first trial, the Supreme Court reversed the district court decision because the trial court excluded a dying declaration clearing the accused. *Id.* Upon remand, the government tried and convicted the defendant again. *Id.*

[20] *Id.* at 239. Two key government witnesses died before the defendant's second trial. *Id.*

[21] *Id.* at 240. The defendant complained that the Constitution provided an accused in a criminal proceeding the right to confront witnesses against him. *Id.* He contended

disagreed.[22] The Court stated that the principal objective of the confrontation clause was to prohibit the use of depositions or affidavits against the accused in lieu of the personal presence of the witness.[23] The Court maintained that the confrontation clause provided the accused an opportunity to compel witnesses to stand face to face with the trier of fact so that the jury could determine whether the witness testified truthfully.[24] The Court noted, however, that the testimony in question had been subject to cross-examination earlier.[25] The majority therefore reasoned that the defendant's confrontation rights were not violated.[26]

Four years after the *Mattox* decision, the Court in *Kirby v. United States*[27] reinforced the fundamental right of a criminal defendant to be present during testimony and to cross-examine witnesses.[28] In *Kirby*,

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that using the testimony of the deceased government witnesses from the proceeding trial violated that right. *Id.*

[22] *Id.* at 243-44. The Court asserted that general rules of law must at times give way to public policy and need. *Id.* To allow a criminal after being once convicted to go free simply because of the death of a former witness would be carrying the constitutional protection provided by the confrontation clause too far. *Id.*

[23] *Id.* at 242. The Court noted that the personal presence of the accusing witness provided the accused an opportunity to personally view the witness and cross-examine him. *Id.*

[24] *Id.* at 243. The Court indicated that an additional purpose of face-to-face confrontation was to allow the fact-finder the opportunity to observe the demeanor of the witness in front of the one person or persons who knew whether or not the witness was telling the truth. *Id.*

[25] *Mattox*, 156 U.S. at 244. The Court observed that once the defendant had the opportunity to see witnesses face to face and then to subject them to the ordeal of cross-examination, the substance of the sixth amendment protection was preserved. *Id.*

[26] *Id.* The Court reasoned that there was an exception in favor of admitting statements made by a witness facing impending death since those circumstances were presumed to remove the temptation to lie. *Id.* In such situations, dying declarations were often admitted as competent evidence notwithstanding that they were not given under oath or subject to cross-examination. *Id.* The Court stated that the confrontation right consisted essentially of the defendant's "seeing the witness face-to-face" and cross-examination. *Id.* Therefore, since the witnesses in *Mattox* were both under oath and subjected to cross-examination, their testimony had equal, if not greater, weight than the traditionally admitted dying declaration. *Id.* Accordingly, the Court found that the statements should have been admitted into evidence. *Id.*

[27] 174 U.S. 47 (1899).

[28] *Kirby*, 174 U.S. at 54. The court stated that the trial court erred by admitting the record of the convictions of the other felons as proof that the property possessed by the defendant was stolen. *Id.* Rather, the trial court should have required the presence of the witnesses themselves. *Id.*; *see* Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television To Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 1006 (1985) (defendant has right to face-to-face meeting with witnesses

the government accused the defendant of receiving and holding property stolen from the United States.[29] At trial, the prosecution offered into evidence the record of the convictions of the three men tried prior to the trial of the defendant for the initial theft of the property in question.[30] Rather than presenting live testimony of witnesses at trial[31] to establish that the goods the accused received were in fact stolen property,[32] the prosecution confronted the defendant with conviction records from a previous trial.[33] The Court declared that facts which could be primarily established only by testifying witnesses[34] could not be proved against an accused except by witnesses who actually faced him at trial and provided the defendant the opportunity to test the accuracy of their testimony before the trier of fact.[35]

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presenting evidence against him).

[29] *Kirby*, 174 U.S. at 49. The government indicted the defendant for receiving and having United States government property in his possession with the intent to convert it to his own use and gain. *Id.* The property included postage stamps of various denominations, United States Treasury Notes, and gold certificates. *Id.*

[30] *Id.* The three men implicated in the actual theft of the property originally pleaded not guilty, but two of the men subsequently withdrew their original pleas and pleaded guilty. *Id.* A jury found the third man guilty. *Id.*

[31] *Id.* at 50-51. When presenting its case, the government referred to the previous convictions of the three men. *Id.* The government indicated to the jury that on the basis of the prior convictions and in the absence of evidence to the contrary, the jury would conclude that the property was stolen. *Id.*

[32] *Id.* at 51.

[33] *Id.* at 55. The Court reasoned that the records of the conviction of the principal felons could not be used to establish the prima facie guilt of the accused. *Id.*; *see* Motes v. United States, 178 U.S. 458, 471-74 (1900) (state introduced evidence consisting of prior recorded testimony of witness whom state did not provide in person notwithstanding fact declarant was present within territory of state; under such circumstances Court held use of out-of-court statements violated defendant's right of confrontation); *cf.* Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (Court held that Tennessee had no obligation under confrontation clause to attempt to compel attendance of witness who had since moved to Sweden). *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 574-75 (1978) (prohibition of trial by affidavit rests at core of our notions of confrontation).

[34] *Kirby*, 174 U.S. at 55. The record did not indicate any reason why the convicted felons from the former trial involving the same stolen goods were not produced to testify. *Id.*; *see* Graham, *Indicia of Reliability and Face-to-Face Confrontation: Emerging Issues in Child Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 66 (1985) (Supreme Court has implicitly premised its discussion of confrontation clause upon firm principle that confrontation clause requires available witnesses to be called at trial before trier of fact for examination by prosecution in presence of accused).

[35] *Kirby*, 174 U.S. at 55. The Court stated that the defendant in a criminal case had the right to physically confront and see the witness while the witness testified. *Id.*; *see* Barber v. Page, 390 U.S. 719, 725-26 (1968) (since right to confrontation is basically trial

It was clear in *Kirby* as it had been in *Mattox* that the Court viewed physical confrontation, when possible, as a right guaranteed by the sixth amendment.[36] The Court posited a similar view of the confrontation clause in *Dowdell v. United States*.[37] In *Dowdell*, the Court was called upon to interpret a provision of the Philippine Bill of Rights.[38] The defendants were convicted[39] of conspiring to steal and convert to their own use certain public funds in the custody and control of one of the defendants.[40] The defendants complained that their sixth amendment confrontation rights were abridged[41] when the judge, clerk of court, and official reporter certified, in accordance with local practice,[42] to certain facts regarding the course of the defendants' trial.[43] The defendants contended that they were denied an opportunity to meet those witnesses face to face.[44] The Court rejected the con-

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right that includes both opportunity to cross-examine and to weigh demeanor of witness, justification for not confronting defendant with witnesses at trial may not be excused by mere fact that defendant had opportunity to cross-examine at preliminary hearing unless witness is actually unavailable).

[36] *See* United States v. Benfield, 593 F.2d 815, 819 (8th Cir. 1979) (physical confrontation ensured by sixth amendment guarantee). *But see* Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause? Article 38.071, Texas Code of Criminal Procedure*, 17 TEX. TECH. L. REV. 1669, 1676 (1986) (United States Supreme Court had never spoken directly of constitutional requirement for face-to-face confrontation of defendant and witness beyond preference for live testimony and opportunity to cross-examine).

[37] 221 U.S. 325 (1911).

[38] *Dowdell*, 221 U.S. at 327. Jurisdiction for the case was under § 10 of the Act of July 1, 1902, ch. 1369, 32 STAT. 691, which established United States Supreme Court authority to review, revise, or reverse judgments of the Supreme Court of the Philippine Islands in which the Constitution or any statute, treaty, title, or privilege of the United States was affected. *Dowdell*, 221 U.S. at 327.

[39] *Dowdell*, 221 U.S. at 328. The defendants included three men who were inspectors and lieutenants of the Philippine constabulary. *Id.*

[40] *Id.* at 326-27. Government officials found evidence of the theft at the home of one of the defendants. *Id.* The defendants also removed a safe in which the stolen funds were previously kept and disposed of it in the waters of the bay. *Id.*

[41] *Id.* at 329. The defendants complained that when the attorney general ordered the case back to the lower court, he ordered certification of certain documentation concerning facts at the previous trial. *Id.* The defendants contended that their rights under the confrontation clause were violated since they were without notice of this action and were unable to confront the persons certifying the facts. *Id.*

[42] *Id.* at 330-31. The Supreme Court of the Philippines approved the practice of trial record certification. *Id.*

[43] *Id.* at 331. The complete record of the trial was not in question. *Id.* The certification process attempted to create a more ample record of the proceeding and supplemented any deficiencies that occurred in the original transcription. *Id.*

[44] *Id.* at 329-30. The Court noted that the Philippine Bill of Rights included a provi-

tention, reasoning that the judge, clerk of court, and official reporter were not witnesses against the defendants.[45] The Court distinguished between officers of the court and regular witnesses, noting that the court administrators were not asked to present new facts or to testify as to the defendants' guilt or innocence but were instructed only to certify certain facts of the trial.[46] In *Dowdell*, the Court articulated its belief in the right of an accused to be confronted with adverse witnesses[47] and to meet the witnesses face to face and sift their testimony before the trier of fact.[48] However, the Court declined to hold that the trial record certification process constituted production of testimony against the accused in violation of their constitutional right to confront their accusers.[49]

In *Pointer v. Texas*[50] the Supreme Court announced that the sixth amendment confrontation right is a fundamental right[51] made obliga-

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sion substantially similar to the sixth amendment of the Constitution of the United States. *Id.*; *see, e.g.*, Mattox v. United States, 156 U.S. 237, 242 (1895) (confrontation right intended to prevent conviction of accused upon depositions or ex parte affidavits since right consists essentially of defendant's "seeing the witness face to face").

[45] *Dowdell*, 221 U.S. at 331. The Court reasoned that the facts certified to were not additional testimony and that the transcribers could not be classified as witnesses. *Id.* Therefore, no violation of the defendant's confrontation right occurred within the meaning of the sixth amendment. *Id.* at 332.

[46] *Id.* at 331-32. The Supreme Court of the Philippines based its review of the lower court decisions on information derived from the trial court record. *Id.* at 331. An attempt to create a more ample record assisted the court, since it did not, as most appellant courts do not, take additional testimony from witnesses. *Id.* at 332.

[47] *Id.* at 330. The Court viewed the sixth amendment confrontation clause as securing for the accused the right to be publicly tried by testimony given in his presence. *Id.*

[48] *Id.* The Court stated that the accused must have the opportunity to cross-examine a witness in order to test the reliability, truth, and recollection of the witness. *Id.*; *see* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (Court stated that "[t]he confrontation clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination"); Mattox v. United States, 156 U.S. 237, 243 (1895) (general rule is that accused should never lose benefit of confrontation safeguards).

[49] *Dowdell*, 221 U.S. at 330-31. The Court stated that there had always been certain well-recognized exceptions to the confrontation right. *Id.* at 330. The Court cited dying declarations, although not made in the defendant's presence, as an example of recognized competent testimony. *Id.* Additionally, the Court noted that documentary evidence could be used to establish collateral facts without direct testimony. *Id.* The court therefore concluded that the certification of trial facts, even though not done in the presence of the accused, was not violative of the rights guaranteed by the confrontation clause. *Id.* at 331.

[50] 380 U.S. 400 (1965).

[51] *Pointer*, 380 U.S. at 403; *see* Barber v. Page, 390 U.S. 719, 725 (1968) (right to confrontation is basically trial right that includes both opportunity to cross-examine and

tory on the states by the fourteenth amendment.[52] In *Pointer*, the state convicted the defendant on a charge of robbery[53] after the prosecution offered into evidence the transcript of a witness' testimony from a preliminary hearing[54] which the defendant attended prior to obtaining counsel.[55] After proclaiming that the sixth amendment's confrontation clause applied to the states through the fourteenth amendment,[56] Justice Black stated that there were few subjects upon which the Court had been more nearly unanimous than the right of an accused to confront and cross-examine adverse witnesses at trial.[57] The Court stated

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occasion for jury to weigh demeanor of witness).

[52] *Pointer*, 380 U.S. at 403. The Supreme Court held that the confrontation right of the sixth amendment was binding upon the states under the due process clause of the fourteenth amendment. *Id.* A series of cases decided in the 1960's reaffirmed the position taken in Malloy v. Hogan, 378 U.S. 1, 3, 6 (1964), that the privilege against self-incrimination was a fundamental right and therefore was safeguarded against state action under the applicable federal standard of the fifth amendment, and that the guarantee would be enforced against the states under the fourteenth amendment according to the same standards that apply against federal encroachment. *Id.* at 3; *see* Benton v. Maryland, 395 U.S. 784, 793-95 (1969) (fifth amendment prohibition against double jeopardy made applicable to states); Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (trial by jury made applicable to states by fourteenth amendment); Washington v. Texas, 388 U.S. 14, 17-19 (1967) (compulsory process for obtaining witnesses made applicable to states); Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967) (held that sixth amendment right to speedy trial enforceable against states under fourteenth amendment); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (sixth amendment right to assistance of counsel made obligatory on states by fourteenth amendment).

[53] *Pointer*, 380 U.S. at 401. Texas police officers arrested the defendant and an accomplice on a charge of robbery by assault and violence. *Id.*

[54] *Id.* The defendant and a man named Dillard were arrested for robbery and taken before a state judge for a preliminary hearing. *Id.* An assistant district attorney examined the state's witnesses when neither defendant was represented by counsel. *Id.* Dillard attempted to cross-examine these witnesses, but apparently Pointer did not. *Id.* During the defendant's trial on the robbery charge, the state's chief witness was unavailable; therefore the transcript of his prior testimony was admitted into evidence under the "former testimony" exception to the hearsay rule. *Id.*

[55] *Id.*

[56] *Id.* at 403.

[57] *Id.* at 405. The Court stated that both confrontation and cross-examination were essential and fundamental to a fair trial in constitutional terms. *Id.*; *see* Davis v. Alaska, 415 U.S. 308, 316 (1974) (cross-examination is principal means by which believability of witness and truth of his testimony are tested); Douglas v. Alabama, 380 U.S. 415, 418 (1965) (primary right secured by sixth amendment right of confrontation is opportunity to cross-examine); *see also* Davenport, *The Confrontation Clause and Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1971) (principal purpose of cross-examination is to challenge whether declarant was sincerely telling what he believed to be truth); Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the*

that the right of confrontation was a fundamental and essential requirement for a fair trial and for the protection of life and liberty.[58] The Court concluded that the use of a transcript to convict the defendant denied him of his confrontation right under the sixth amendment and that his conviction must therefore be reversed.[59]

The Court in *California v. Green*[60] considered the application of the confrontation clause in the context of admissibility of prior inconsistent statements of a witness[61] proffered as substantive evidence[62] under section 1235 of the California Evidence Code.[63] In *Green*, state undercover agents arrested the defendant for selling marijuana to the witness.[64] At the preliminary hearing, the witness identified the defendant as his supplier.[65] At trial, however, the witness became unco-

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Sixth Amendment, 85 COLUM. L. REV. 1294, 1302 (1985) (*Mattox* interpretation of confrontation clause and its emphasis on cross-examination has been reaffirmed repeatedly by Supreme Court).

[58] *Pointer*, 380 U.S. at 404. The founding fathers considered the right of confrontation so essential that they protected it from legislative and judicial interference by a provision in the Constitution. *Id.*

[59] *Id.* at 407. The Court reasoned that the case might be different if the witness had made the statement at a full hearing. *Id.* The Court additionally observed that the statements were taken under circumstances that provided the defendant no real opportunity to cross-examine the witness. *Id.* The Court therefore concluded that the transcript testimony lacked the necessary reliability to be offered at trial against the accused. *Id.*; *see* Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 91-92 (1971) (all hearsay should be excluded except when prosecution showed absolute necessity, high degree of trustworthiness, and total absence of motive to falsify).

[60] 399 U.S. 149 (1970).

[61] *Green*, 399 U.S. at 152. The issue in the case involved prior statements by a witness. *Id.* Police agents arrested the defendant for selling marijuana to an undercover agent. *Id.* While in juvenile detention, the witness identified the defendant as his supplier. *Id.*

[62] FED. R. EVID. 801(d)(1)(A) advisory committee's note provides in part: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. . . . In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at trial . . . ." *Id. But see* Griswold, *The Due Process Clause Revolution and Confrontation*, 119 U. PA. L. REV. 711, 713 (1971) (literal examination of words in confrontation clause would result in conclusion that only testimony by witnesses physically present in courtroom admissible).

[63] CAL. EVID. CODE § 1235 (1966) provides in part: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . ." *Id.*

[64] *Green*, 399 U.S. at 153.

[65] *Id.* at 151. At a preliminary hearing, the defendant's counsel subjected the witness to extensive cross-examination. *Id.* At the conclusion of the hearing, the state charged the defendant with furnishing marijuana to a minor based upon the witness' testimony.

operative.[66] Such being the case, the prosecution offered and the trial court admitted the prior statements[67] of the witness, and the jury convicted the defendant.[68] The California Supreme Court reversed the defendant's conviction.[69] The United States Supreme Court reversed the decision of the California Supreme Court,[70] holding that the confrontation clause was not violated when prior statements made by a witness at a preliminary hearing and to a police officer were admitted to prove the truth of the matter contained therein.[71] In its analysis, the Court identified three purposes of confrontation:[72] "[it] ensures that the wit-

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Id.

[66] *Id.* at 152. At the trial of the defendant, the witness became evasive and uncooperative. *Id.* He claimed that he could not recall who supplied him with the marijuana because he was under the influence of LSD at the time of the transaction. *Id.* He admitted making the prior statements but could not remember the actual events of the transaction. *Id.*

[67] *Id.* The trial court let the prior testimony in as substantive evidence. *Id.*

[68] *Id.* at 153. The state convicted the defendant primarily on the basis of the testimony presented at the preliminary hearing. *Id.*

[69] *Id.* The District Court of Appeals reversed the trial court's decision, and the California Supreme Court affirmed the reversal. *Id.* The California Supreme Court reasoned that the use of prior inconsistent statements as substantive evidence was unconstitutional. *Id.*

[70] *Id.* at 170.

[71] *Id.* The Court stated that many years ago it had held that prior testimony of an unavailable witness did not violate the confrontation clause. *Id.* at 165. Although the witness was available in the present case, the Court noted that the defendant's counsel subjected the witness to an extensive cross-examination. *Id.* The Court concluded that it was untenable to interpret the confrontation clause to permit the use of prior testimony to prove a case where the declarant was unavailable, yet reject testimony where the declarant was available at trial, face to face with the defendant and subject to cross-examination. *Id.* at 166. Relying on the proposition that the defendant's opportunity to cross-examine the witness at trial satisfied the sixth amendment requirements, the Court found no constitutional violation in the admission of testimony given at a preliminary hearing. *Id.* at 164-68. The Court declined, however, to decide the admissibility of the same witness' out-of-court statement made to a police officer regarding events that he [the witness] was unable to recall at trial. *Id.* at 168-70. Remanding the issue of statements made to the police officer, the Court noted that the state court had not considered, and the parties had not briefed, the possibility that the witness' memory loss so affected the defendant's right to cross-examine as to violate the confrontation clause. *Id.*; *see* Read, *The New Confrontation—Hearsay Dilemma*, 45 CAL. L. REV. 1, 2 (1972) (argued that Court's identification of right to cross-examination as core value protected by confrontation clause could be seen as giving hearsay rule constitutional dimensions since right of cross-examination was also core value protected by hearsay rule). *But see* Note, *The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 645 (1985) (evidence could be admitted under recognized hearsay exception and still violate confrontation clause).

[72] *Green*, 399 U.S. at 158. The Court stated that, viewed historically, the admission

ness will give his statements under oath . . .;[73] (2) [it] forces the witness to submit to cross-examination . . .;[74] [and] (3) [it] permits the

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of out-of-court statements did not violate the confrontation clause if the declarant was present at the trial and available for cross-examination. *Id.* The Court articulated what it considered to be the functional purposes and protections provided by the confrontation clause. *Id.* The Court then compared its view of the protections the clause afforded to a criminal defendant with the resulting frustration of those purposes when an out-of-court statement was allowed into evidence. *Id.* In so doing, the Court concluded that what was lost by allowing the out-of-court statement was regained if the declarant appeared at trial and subjected himself to the defendant's cross-examination regarding the prior statements. *Id.* at 159.

[73] *Id.* The Court reasoned that an oath or affirmation was needed at trial to impress upon the witness the seriousness of the occasion as well as to serve as a reminder to the witness that he was subject to perjury. *Id.*; *see* Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (out-of-court statements traditionally excluded because they lacked conventional indicia of reliability of statements made under oath or other circumstances that impressed speaker with solemnity of his statements); Monahan v. Clemons, 212 Ky. 504, 508, 279 S.W. 974, 975 (1926) (testimony of deceased witness at former trial could not be admitted in absence of showing that witness was sworn at time testimony given); Jolly v. State, 269 So. 2d 650, 654-55 (Miss. 1972) (requirement that statement given at preliminary hearing must have been under oath is essential prerequisite to establishing testimony's trustworthiness); FED. R. EVID. 603 (requiring witness to declare that he will testify truthfully by oath or affirmation calculated to awaken his conscience with duty to do so).

[74] *Green*, 399 U.S. at 158; *see* 5 J. WIGMORE, EVIDENCE § 1395, at 150 (J. Chadbourne rev. ed. 1974) (author believed that main purpose of confrontation right was to cross-examine, not to gaze upon witness or be gazed upon by him); *see also* United States v. Owens, 108 S. Ct. 838, 845 (1988) (defendant's confrontation rights were not violated by admission of out-of-court identification made by witness shortly after he suffered head injuries, although same witness could not later remember what factors he relied upon in making identification). The majority in *Owens* reasoned that the forgetfulness of the witness did not in itself deprive the defendant of a right to cross-examination. *Id.* at 842. "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (emphasis added)). The Court acknowledged that while it was true that the witness' out-of-court statement was one "that would traditionally be categorized as hearsay," there was no need to insist upon the "indicia or reliability" ordinarily required when the witness is unavailable. *Id.* at 843. The Court felt that such a requirement was not called for "when a hearsay declarant is present at trial and subject to unrestricted cross-examination." *Id.* In that setting, "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." *Id.*; *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) ("[t]he confrontation clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (confrontation clause is generally satisfied when defense is given fair opportunity to probe and expose infirmities that witness may have through cross examination); Davis v. Alaska, 415 U.S. 308, 319 (1974)

jury to observe the demeanor of the witness . . . thus aiding the jury in assessing his credibility."[75] The Court acknowledged that a prior out-of-court statement might be made under circumstances where none of these protections were present[76] but reasoned that each of the purposes

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(right of confrontation was paramount to state's policy of protecting juvenile offenders where temporary embarrassment which might result from disclosure of juvenile records was "outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness"); Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (confrontation clause demands evidence admitted at trial be subjected to cross-examination to guarantee accurate verdict); Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (confrontation clause does not bar admission of out-of-court statements where defendant has benefit of full and effective cross-examination); Smith v. Illinois, 390 U.S. 129, 130-31 (1968) (where state's key witness was allowed to use alias at trial and testified that he had purchased heroin from defendant, Court held that procedure violated defendant's right of confrontation since opportunity to expose falsehoods and bring out truth through cross-examination must be given to examiner). The Court in *Smith* stated that "[i]t is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop." *Id.* at 132 (quoting Alford v. United States, 282 U.S. 687, 692 (1931)).

[75] *Green*, 399 U.S. at 158. The Court noted that observation of the witness on the stand aided the jury in determining the believability of that witness. *Id.*; *see* Mattox v. United States, 156 U.S. 237, 242-43 (1895) (purpose of confrontation clause is to compel witness to stand face-to-face with jury in order that they might look at him and judge his demeanor); *see also* Jay v. Boyd, 351 U.S. 345, 374-76 (1956) (Douglas, J., dissenting) (fairness as it relates to due process requires that any hearing be full and open with opportunity for defendant to know charge, his accusers, to answer charge and meet his accusers). In *Jay*, Justice Douglas quoted Professor Chafee as to the benefits of face-to-face confrontation:

> One important benefit from confronting the suspect with his accusers is the opportunity to cross-examine them and rigorously test any dubious statement . . . . An honest witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts . . . . As for a false witness, the tribunal can learn ever so much more by looking at him . . . .

Id. at 375-76 (Douglas, J., dissenting) (quoting Z. CHAFEE, THE BLESSINGS OF LIBERTY 35 (1956)); Williams v. Melton, 733 F.2d 1492, 1496 (11th Cir.) (purpose of confrontation right is not only to allow defendant chance to cross-examine but to allow jury to observe and judge credibility of witness), *cert. denied*, 469 U.S. 1073 (1984) ; Herbert v. Superior Court, 117 Cal. App. 3d 661, 670, 172 Cal. Rptr. 850, 855 (1981) (quoting U.S. v. Benefield, 593 F.2d 815, 821 (8th Cir. 1979)) (where defendant in child sexual abuse case was seated so that he could not see complaining witness during her testimony, court held that confrontation rights of defendant were violated and court observed that "[m]ost believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge."); 5 J. WIGMORE, *supra* note 74, § 1395, at 150-53 (allowing jury to judge demeanor of witness is secondary to cross-examination).

[76] *Green*, 399 U.S. at 158. The Court noted that the witness was under oath at the preliminary hearing and that the defendant had the right to cross-examine the witness at

of confrontation was satisfied when the declarant testified at trial.[77]

The United States Supreme Court in *Ohio v. Roberts*[78] addressed the question of admissibility of prior testimony of an unavailable declarant.[79] In *Roberts*, the state charged the defendant with forgery.[80] At a preliminary hearing, a witness strengthened the state's case when she denied giving the defendant access to the forged items.[81] At trial the witness had become unavailable to testify.[82] The trial court received

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that time. *Id.* Additionally, the Court reasoned that there may be circumstances where the protections of oath and cross-examination are not present. *Id. See generally* C. McCormick, McCormick's Handbook of the Law of Evidence 584 (2d ed. 1972) (hearsay evidence is testimony in court of statement made out of court offered as assertion to show truth of matter asserted therein).

[77] *Green*, 399 U.S. at 158. The Court concluded that a witness who related a different story at trial from the one to which he formerly testified, faced a dilemma. *Id.* The witness' presence at trial forced him to take a position as to the truth of his former statement. *Id.* at 159. Therefore, the jury observed and evaluated the witness' demeanor as he either disavowed or qualified his earlier statement. *Id.* Cross-examination at trial thus provided a crucial safeguard against the dangers of admitting former testimony. *Id.* The Court felt that since its own delineated protections or purposes of the confrontation right were fulfilled by the admission of prior statements of a witness at a present trial when subjected to cross-examination, the confrontation rights of the defendant were not violated. *Id.* at 158. The Court noted, however, that the confrontation clause guaranteed more than just protection of the defendant against hearsay. *Id.* at 155-56. The Court opined as follows:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

Id. at 155-56.

[78] 448 U.S. 56 (1980).

[79] *Roberts*, 448 U.S. at 59. The witness testified at a preliminary hearing but did not attend the trial of the defendant. *Id.*

[80] *Id.* The police arrested the defendant for forging a check belonging to a witness' father. *Id.* Additionally, the local authorities brought charges against the defendant for possession of stolen credit cards that belonged to the witness' father and mother. *Id.*

[81] *Id.* at 58. At a preliminary hearing, the defense counsel called the witness to testify in order to attempt to establish the fact that she allowed the defendant to use her apartment. *Id.* The prosecution then attempted to draw a confession from the witness that she gave the defendant permission to use the checks and credit cards at issue. *Id.* The witness, however, denied allowing the defendant any such access to the items. *Id.*

[82] *Id.* at 59. In preparation for trial, the prosecution issued five subpoenas to the witness for four different trial dates. *Id.* The state failed to locate the witness, and she did not appear at trial. *Id.*

the preliminary hearing testimony into evidence,[83] and the defendant was convicted.[84] After the Ohio Supreme Court affirmed the Ohio Court of Appeal's reversal of the conviction, the United States Supreme Court reversed and upheld the conviction,[85] finding the preliminary hearing testimony admissible.[86] The Court reasoned that the confrontation clause operated in two ways to restrict what would be considered admissible hearsay.[87] First, since the founding fathers had a preference for face-to-face encounters between accusing witnesses and the accused, a "rule of necessity" flowed from the sixth amendment, requiring the prosecution either to produce the witness or to demonstrate that witness' unavailability.[88] The Court stated that the second restriction regarding hearsay occurred only after it was shown that the witness was unavailable.[89] The Court explained that in the case of wit-

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[83] *Id.* at 60. The defendant testified that the witness gave him her parents' checks and credit cards. *Id.* On rebuttal, the state offered the preliminary hearing transcript of the witness' prior testimony. *Id.*

[84] *Id.* at 61. The defendant appealed his conviction to the Ohio Court of Appeals, which reversed the conviction on the basis that the state failed to make a sufficient effort to locate the witness. *Id.* The Ohio Supreme Court affirmed the reversal on different grounds and concluded that the trial court could have inferred that the prosecution made diligent efforts to procure the witness' appearance at trial. *Id.* at 60. As to the admissibility of the transcript of the preliminary hearing testimony, the Ohio Supreme Court reasoned that the transcript was inadmissible because the mere opportunity to cross-examine the witness at the preliminary hearing did not adequately afford the defendant his constitutional right of confrontation. *Id.* at 61.

[85] *Id.* at 77. The Supreme Court of the United States reversed the Ohio Supreme Court ruling and upheld the conviction of the defendant. *Id.*

[86] *Id.* at 73.

[87] *Id.* at 65.

[88] *Id.* at 65; *see* Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (where there was adequate opportunity to cross-examine witness at first trial and counsel for defendant availed himself of the opportunity, transcript of witness' testimony from first trial bore sufficient "indicia of reliability" so as to provide jury adequate basis upon which to evaluate truth); Barber v. Page, 390 U.S. 719, 724-25 (1968) (witness is not unavailable under exception to confrontation clause unless prosecution has made good-faith effort to obtain witness' presence at trial); Motes v. United States, 178 U.S. 458, 471 (1900) (admission into evidence of witness' statement taken at examining trial was violation of defendant's confrontation right where witness was absent from trial due to negligence of government); *cf.* Dutton v. Evans, 400 U.S. 74, 87-90 (1970) (court found that where 20 witnesses appeared for prosecution and where one witness testified as to conversation he had with fellow prisoner about defendant and such testimony was admitted under co-conspirator exception to hearsay rule, prosecution was not required to produce seemingly available witness).

[89] *Roberts*, 448 U.S. at 65. The Court noted that the witness' " 'whereabouts were entirely unknown.' " *Id.* at 61 (quoting State v. Roberts, 55 Ohio St. 2d 191, 194, 378 N.E.2d 492, 495 (1978), *rev'd*, 448 U.S. 56 (1980)). The Court acknowledged that the trial

ness unavailability, the party seeking to admit the testimony must demonstrate that the prior testimony was obtained under circumstances providing satisfactory "indicia of reliability."[90] The Court concluded that such was the rule with certain hearsay exceptions for prior testimony given at a proceeding where the defendant had an adequate opportunity to cross-examine the witness.[91]

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judge could reasonably have concluded that the witness could not have been procured in spite of a good faith effort to do so. *Roberts*, 448 U.S. at 75. Since the trial judge concluded that the witness had left San Francisco, he could properly declare the witness unavailable to testify. *Id.*; *see* Warren v. United States, 436 A.2d 821, 830 n.18 (D.C. 1981) (for child to be found unavailable, court suggested looking at following factors in determining whether child witness should testify on basis of likelihood of severe psychological injury: (1) probability of psychological injury to child who testified, (2) severity of anticipated injury, (3) probable duration of injury should it occur, and (4) whether expected psychological injury is substantially greater than response of typical victim of rape, kidnapping, child abuse or terrorism). *See generally* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 823 (1985) (author conceded that Supreme Court had defined right to confrontation as face-to-face meeting, yet argued that right of confrontation may be satisfied without face-to-face meeting).

[90] *Roberts*, 448 U.S. at 65. The Court reasoned that for an exception to the hearsay rule to pass constitutional muster where the confrontation clause was at issue, the hearsay must be proven to possess a high degree of trustworthiness and that "there is no material departure from the reason for the general rule." *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)); *see* Bourjaily v. United States, 483 U.S. 171, 183 (1987) (confrontation clause not violated by admission of out-of-court statements of co-conspirator); United States v. Inadi, 475 U.S. 387, 399-400 (1986) (admission of out-of-court statements made by non-testifying co-conspirator allowed); Chambers v. Mississippi, 410 U.S. 284, 298-99 (1973) (exceptions to hearsay rule developed over time to allow admission of hearsay statements made under circumstances that tended to assure reliability and thus compensate for absence of oath and cross-examination); Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) (focus of Court's concern when departing from strict hearsay compliance has been to insure that "indicia of reliability" are present since such reliability is determinative of whether testimony may be presented to jury notwithstanding lack of actual confrontation with the declarant).

[91] *Roberts*, 448 U.S. at 65-66. The Court noted that the defendant's counsel, in his direct examination, had challenged the witness' perception of the events, as well as her veracity, and was not limited "in any way" as to the line of questioning. *Id.* at 71. Thus, as in *Green*, the principal "purposes" for the confrontation right, as articulated by that decision, were established. *Id.* That is, since the defendant's counsel had "in form" cross-examined the witness by the use of leading questions and questioned the witness so as to challenge her sincerity as to the truth of certain statements she made, her memory, and use of particular language, the benefit of the purpose of cross-examination was clearly afforded the defendant. *Id.* Hence, a substantial compliance with the purposes of the confrontation clause requirement was met. *Id.* at 73, 77. Thus the Court held that the transcript was admissible as an exception to the confrontation right. *Id.* at 77. In a footnote, the Court acknowledged that reconciling the confrontation clause and hearsay rules had triggered several theories regarding the protections afforded by each, many of which

The United States Supreme Court recently decided the case of *Kentucky v. Stincer*.[92] In *Stincer*, the state charged the defendant with first degree sodomy involving three children.[93] The defendant was excluded from an in-chambers pretrial hearing, the purpose of which was to make a preliminary determination as to whether the three children had a sufficient understanding of the obligation to tell the truth and

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could be found in recent scholarly commentary. *Id.* at 66 n.9. The Court noted that some observers would have the Court shift the analysis in favor of the criminal defendant. *Id.*; *see, e.g.*, Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 91-92 (1971) (proposing that all hearsay should be excluded except when prosecution shows absolute necessity, high degree of trustworthiness, and "total absence" of motive to falsify); Note, *Constitutional Law—Confrontation Clause—Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Clause Guarantee Despite Lack of Cross Examination*, 31 VAND. L. REV. 682, 694 (1978) (rather than eroding confrontation guarantee by use of "reliability" standard to determine constitutional muster, courts should hold that confrontation clause absolutely bars admission of testimony not subjected to cross-examination where such statements are sought to be admitted against criminal defendants). The Court indicated that, as could be expected, other commentators would relax the constitutional restrictions on use of hearsay by the prosecutor. *Roberts*, 448 U.S. at 67 n.9; *see, e.g.*, Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1216-17 (1979) (Court's continued silence on relationship between hearsay and confrontation rights engenders uncertainty which has practical effect of skewing law against prosecution); Note, *The Confrontation Test for Hearsay Exceptions: An Uncertain Standard*, 59 CALIF. L. REV. 580, 594 (1971) ("fixed procedural definition of the confrontation clause makes actual protection afforded depend upon particular evidence rules in force in each state"). The Court indicated that still other commentators had proposed rules which might both hurt or help the accused. *Roberts*, 448 U.S. at 67 n.9.; *see, e.g.*, Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 UCLA L. REV. 366, 376-77 (1966) (hearsay statement should be admitted into evidence if probative value of evidence rendered its admissibility fair under sliding scale when "the greater the actual need, the less probative value needed"). The Court indicated that still others had generally agreed with the position taken by the Court in its decisions regarding confrontation rights and hearsay. *Roberts*, 448 U.S. at 67 n.9; *see, e.g.*, Read, *The New Confrontation—Hearsay Dilemma*, 45 S. Cal. L. Rev. 1, 48 (1972) ("the traditional approach . . . with its recognition of a core constitutional value to be preserved, but with its reluctance to make sweeping declarations as to the meaning of that right . . . is the best . . . compromise . . . ."). The Court indicated that notwithstanding the numerous commentaries of a critical nature on the subject, it rejected "the invitation to overrule a near-century of jurisprudence." *Roberts*, 448 U.S. at 68 n.9. This was so because it was convinced that "no rule will perfectly resolve all possible problems." *Id.* (quoting Natali, Green, Dutton & Chambers: *Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 73 (1975)).

[92] 482 U.S. 730 (1987).

[93] *Stincer*, 482 U.S. at 732. The defendant, Sergio Stincer, was indicted and charged with committing first degree sodomy with an eight-year-old girl, a seven-year-old girl, and a five-year-old boy. *Id.*

had the intellectual capacity to testify compently.[94] The defendant argued that his exclusion from the competency hearing violated his sixth amendment confrontation right.[95] The Supreme Court found that the defendant's confrontation right was not violated.[96] The Court ex-

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[94] *Id.* After the jury was sworn, but before any evidence or testimony was presented, the trial judge conducted an in-chambers hearing to ascertain the competency of the two girls to testify. *Id.* Prior to the competency hearing, the prosecutor moved to drop charges with regard to the five-year-old boy, inasmuch as it was the prosecutor's opinion that the child was not competent to testify. *Id.* n.1. The two girls were separately examined by the judge, the prosecutor, and the defendant's counsel, who was a public defender. *Id.* at 733. The record was replete with information that the defendant's attorney asked the girls questions to determine if they remembered facts and whether they could distinguish between telling the truth and telling a lie. *Id.* Questions regarding each girl's age, date of birth, name of her school, teacher's name, and name of her Sunday school were asked. *Id.* The two girls were not questioned as to the facts of the case or the substance of their possible testimony. *Id.* The trial judge concluded that the girls were competent to testify. *Id.* The defendant's counsel did not object to the judge's ruling. *Id.*; *see* Bulkley, *Legal Proceedings, Reforms and Emerging Issues in Child Sexual Abuse Cases*, 6 BEHAV. SCI. & L. 153, 155 (1988) (problems arise at trial since credibility of each child witness is often questioned because of misunderstanding as to competency of child regarding memory, suggestibility and ability to distinguish between fact and fantasy); *cf.* Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES, 125, 127 (1984) (evidence indicates that children do not necessarily fantasize about things outside their realm of normal experience such as sexual encounters); Cozzews, *Use of Videotaping To Avoid Traumatization of Child Sexual Abuse Victim-Witnessess*, 21 LAND & WATER L. REV. 565, 566 (1986) (in great majority of cases child is fully capable to testify; however, recanting story at trial in front of people who hurt him often terrifies child, leading to great psychological harm).

[95] *Stincer*, 482 U.S. at 735. The jury convicted the defendant of first degree sodomy under KY. REV. STAT. ANN. § 510.010(1) (Baldwin 1985). *Stincer*, 482 U.S. at 734-35 & n.6. The court fixed his sentence at 20 years imprisonment, the minimum sentence for a class A felony under the Kentucky statute. *Id.* at 734-35. On appeal to the Kentucky Supreme Court, the defendant argued that his sixth amendment confrontation right was violated. *Id.* at 735. The Kentucky Supreme Court, by a divided vote, reversed the trial court conviction of Stincer and held that under both the federal sixth amendment right of the Constitution and under § 11 of the Bill of Rights of the Kentucky Constitution, the defendant was deprived of his right to be present and "meet the witnesses face to face." *Id.* The Kentucky Supreme Court based its reasoning partly on the fact that the defendant's trial might not have taken place had the preliminary hearing determined that the children were not competent to testify. *Id.* Thus it was the Kentucky Supreme Court's opinion that the hearing "was a crucial phase of the trial." *Id.* (quoting Stincer v. Commonwealth, 712 S.W.2d 939, 940 (1986)).

[96] *Stincer*, 482 U.S. at 744. The Court concluded that the defendant's rights as protected by the confrontation clause were not violated by his exclusion from the trial court's preliminary hearing. *Id.* It should be noted that the federal sixth amendment confrontation clause was the basis of the decision in *Stincer*. *Id.* at 735 n.7. As the United States Supreme Court noted, the Kentucky Supreme Court repeatedly referred to the federal Constitution, as opposed to the Kentucky Constitution, as supporting its

plained that, in deciding past confrontation clause cases,[97] its holdings clearly established the right of a defendant to confront his accusers.[98] The Court emphasized the importance of securing, through the confrontation clause, the criminal defendant's right to cross-examine witnesses[99] in order that the jurors might be exposed to facts from which they could draw conclusions relating to reliability,[100] all of which were

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reversal of the trial court conviction. *Id.* Additionally, there was no indication in the Kentucky Supreme Court's ruling that the defendant's rights under the Kentucky Constitution were distinct from, or broader than, those he was entitled to under the sixth amendment of the federal Constitution. *Id.*

[97] *Id.* at 736-38. The Court indicated that in its past decisions involving confrontation rights, the cases fell into two broad, but not exclusive, categories. *Id.* at 737. The first category included "cases involving the admission of out-of-court statements." *Id.*; *see, e.g.*, Ohio v. Roberts, 448 U.S. 56, 73 (1980) (since defense counsel engaged in full cross-examination of witness at preliminary hearing, out-of-court statement was sufficiently reliable to admit at trial); California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE, *supra* note 74, § 1367, at 29 (on cross-examination as " 'greatest legal engine ever invented for the discovery of truth' "). The Court noted that the second category of cases involving the confrontation clause occurred in circumstances where the opportunity for the defendant to cross-examine a witness or witnesses was restricted by law or the trial court on the scope of cross-examination. *Stincer*, 482 U.S. at 738; *see, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (trial court violated defendant's confrontation right when defense counsel was precluded from questioning prosecution witness about state's dismissal of pending drunkenness charge which was relevant to his motive for testimony); Davis v. Alaska, 415 U.S. 308, 317-18 (1974) (confrontation clause violated where defense counsel was restricted in questioning witness about juvenile record as such questioning went to credibility of witness).

[98] *Stincer*, 482 U.S. at 736. The Court emphasized a passage from *Mattox* wherein the Court stated the following:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of *compelling him to stand face to face with the jury* in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. (quoting Mattox v. United Sates, 156 U.S. 237, 242-43 (1895) (emphasis added)).

[99] *Stincer*, 482 U.S. at 736-39. The Court indicated that even though there surely would be cases arising under the confrontation clause which would not "neatly fit" into the broad categories it had delineated, the confrontation clause's functional purpose was to protect the defendant's opportunity for cross-examination. *Id.* at 739.

[100] *Id.* at 738. The Court cited *Davis* in its examination of the second category of typical confrontation clause cases. *Id.* In *Davis*, the Court held that the defendant's confrontation clause rights were violated because he was denied the right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318; *cf.* Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (plurality interpreted confrontation clause to mean that right of confronta-

essential to determining the believability of a witness and testing the truth of his testimony.[101] The Court reasoned, however, that even though the trial judge excluded the accused from the pretrial proceeding, under the circumstances of the case, the exclusion from the hearing did not interfere with the defendant's opportunity for cross-examination.[102] The Court concluded that since the children were subject to "full and effective" cross-examination at trial, with the judge's preliminary rulings subject to reconsideration upon the witnesses' testimony at trial, the defendant's confrontation rights were not violated.[103]

In the instant case, the United States Supreme Court recognized that the sixth amendment confrontation right not only granted to criminal defendants the right to cross-examine witnesses,[104] but also extended beyond cross-examination and encompassed the right to a face-to-face meeting between accuser and accused.[105] Having stated

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tion is designed simply "to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination").

[101] *Stincer*, 482 U.S. at 736.

[102] *Id.* at 744. It was the Court's view that, under the circumstances of the case, the defendant's exclusion from the hearing did not relate to the crime itself but only to each child's capacity to understand the facts and what was expected of him. *Id.* at 733, 744. Moreover, many of the questions asked at the pre-trial hearing were repeated at trial, and the judge's preliminary rulings were subject to change upon the testimony at trial of the two children. *Id.* at 733-34, 744. More importantly, the Court reasoned that since the children were subject to a "full and effective" cross-examination at trial, the defendant's confrontation rights were not violated. *Id.* at 744.

[103] *Id.* at 744.

[104] Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988). The majority opinion initially noted several historical examples of the right of confrontation. *Id.* In so noting, the majority conceded that most of the decisions of the Court involving the confrontation clause addressed either admissibility of out-of-court statements or restrictions on the scope of cross-examination. *Id.*; *see, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (addressing restrictions on scope of cross-examination); Ohio v. Roberts, 448 U.S. 56, 65 (1980) (involving admissibility of out-of-court statements); California v. Green, 399 U.S. 149, 164 (1970) (determination of whether out-of-court statements made by witness in preliminary hearing could be admitted where declarant changed testimony at trial).

[105] *Coy*, 108 S. Ct. at 2800-01. The majority stated that the historical interpretation of the word "confront" had its roots in Latin and was derived from the prefix "con" which means "against" or "opposed" and the noun "frons" which means "forehead." *Id.* at 2800. Therefore, since confrontation is defined as a face-to-face encounter, it must follow that such an actual confrontation was a "literal" requirement of the confrontation clause itself. *Id.* at 2801. In fact, Justice Scalia indicated that actual confrontation, being an explicit requirement, was the most essential element of the confrontation right. *Id.* While the United States Constitution, *see supra* note 14, and many state constitutions provide that a defendant has a right "to be confronted with witnesses," 19 state constitutions use the words "face to face." *see, e.g.*, ARIZ. CONST. art. 2, § 24; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; ILL. CONST. art. 1, § 8; IND. CONST. art. 1, § 13; KAN. CONST. §

that a face-to-face meeting was an essential interest protected by the confrontation clause,[106] the Court reasoned that any abridgement of that narrow, explicit right to see and be seen by witnesses violated the literal meaning of the clause.[107] The Court acknowledged exceptions to the implicit rights conferred by the clause,[108] but declined to commit itself on whether the right to face-to-face confrontation was subject to any exceptions or even whether the important public policy issue in *Coy*, that of protecting child witnesses, was sufficient to justify an exception.[109] The Court posited that any exception, whether it be to the

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10; KY. CONST. § 11; MASS. CONST. Part 1, art. XII; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. 1, § 11; N.H. CONST. Part 1, art. 15; OHIO CONST. art. I, § 10; OR. CONST. art. I, § 11; PA. CONST. art. 1, § 9; S.D. CONST. art. VI, § 7; TENN. CONST. art. 1, § 9; WASH. CONST. art. 1, § 22; WIS. CONST. art. 1, § 7.

[106] *Coy*, 108 S. Ct. at 2801. The majority cited previous decisions involving the confrontation clause wherein the Court had posited: "The literal right to 'confront' the witness at the time of trial form[s] the 'core of the values furthered by the confrontation clause.' " *Id.* (quoting California v. Green, 399 U.S. 149, 157 (1970)); *see* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (confrontation clause provides for criminal defendant "the right physically to face those who testify against him").

[107] *Coy*, 108 S. Ct. at 2801. The majority opinion indicated that face-to-face encounters served both symbolic as well as functional purposes. *Id.* at 2801. The majority reasoned that such a face-to-face encounter between the defendant and witness gave the appearance of fairness and that satisfied the public's feeling that the criminal justice system was equitable. *Id.* at 2801-02. The majority indicated that the idea that confrontation was essential to the perception of fairness had existed for centuries. *Id.* at 2802. The majority noted that "a witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Id.* (quoting Z. CHAFEE, THE BLESSINGS OF LIBERTY 35 (1956)).

[108] *Id.* at 2800-01. The majority stated that the other elements or protections afforded by the confrontation clause, other than face-to-face confrontation, were judicially created components of the right and thus were not as well established. *Id.* The majority acknowledged that some elements of confrontation, such as the right to cross-examine and the right to exclude out-of-court statements, were subject to exceptions since they were "reasonably implicit" rights afforded by the clause. *Id.* at 2802. Justice Scalia explained that those rights were not explicitly provided for in the clause; rather, they were implicit or incidents of the right. *Id.* at 2800-02. In a footnote, the majority addressed the dissent's discussion of Wigmore's treatment of the confrontation right. *Id.* at 2801-02 n.2. The majority acknowledged Wigmore's view that the purpose of the confrontation right was to provide the defendant the opportunity to cross-examine witnesses; however, it was the majority's conclusion that even if cross-examination was one important purpose of confrontation, cross-examination alone did not always completely discharge the right. *Id.*

[109] *Id.* at 2803. The majority explained that the right to a face-to-face confrontation was "the right narrowly and explicitly set forth in the Clause" and therefore was a "literal" requirement of the sixth amendment. *Id.* at 2802. Hence, even though the implicit protections afforded by the clause, such as cross-examination, were subject to judicially created exceptions, it did not absolutely follow that the most essential, explicit right

implicit or explicit rights protected by the confrontation clause, must either be in furtherance of a significant public interest or firmly established by jurisprudence as a recognized exception.[110] Therefore, the Court concluded that an exception created by a "legislatively imposed presumption" of need,[111] made without a case-specific factual showing of necessity, and not firmly rooted as a recognized exception, violated the defendant's confrontation right.[112]

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protected by the clause was likewise subject to an exception. *Id.* at 2803.

[110] *Id.* at 2803. The Court declined to determine whether the right to a face-to-face confrontation was subject to "any" exceptions. *Id.* Furthermore, it was the majority's position that if there were any exceptions, the explicit right to a face-to-face encounter would only be subject to exceptions that were "necessary to further an important public policy." *Id.*

[111] *Id.*

[112] *Id.* The majority believed that no such compelling interest had been established by the prosecution in *Coy*. *Id.*; *see, e.g.*, Ohio v. Roberts, 448 U.S. 56, 64 (1980) ("competing interests, if 'closely examined' . . . may warrant dispensing with confrontation at trial"; "necessities of the case" and interests of "effective law enforcement" are such competing interests). The majority flatly rejected any suggestion, as the prosecution had, that compelling state interests existed in *Coy* which necessitated an exception that would infringe the literal and explicit right to a face-to-face confrontation. *Coy*, 108 S. Ct. at 2803. The prosecution had suggested that the Iowa statute created a "legislatively imposed presumption" of need for the law in question since it protected child victims from being compelled to testify in court; however, the majority rejected the state's position and stated that "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." *Id.* at 2803; *cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (where trial court was concerned with exclusion of press and public from criminal case in order to protect child victim, United States Supreme Court stated that trial court could determine on case-by-case basis whether closure was necessary to protect welfare of minor victim); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (plurality opinion) (suggested that individualized determinations are always required before right of access to trial denied; absent overriding interest articulated in findings, trial court must be open to public).

Justice O'Connor filed a separate concurring opinion to note specifically her view that confrontation clause rights were not absolute. *Coy*, 108 S. Ct. at 2803 (O'Connor, J., concurring). Justice O'Connor departed from the majority view regarding exceptions to the face-to-face confrontation right. *Id.* at 2803-04. In her concurring opinion, Justice O'Connor argued that, like other elements of the confrontation clause, face-to-face confrontation was subject to exceptions. *Id.* at 2803. While agreeing with the majority that any exception should be permitted only upon the showing of a case-specific necessity, Justice O'Connor indicated that "in an appropriate case . . . procedural devices designed to shield a child witness from the trauma of courtroom testimony" might be used. *Id.* at 2803. The concurrence thus extended the majority opinion to permit exceptions, such as protective devices for child witnesses, where the case-specific need arose. *Id.* at 2805. Justice O'Connor acknowledged the gravity of the problem of child sexual abuse and the growing number of reported cases. *Id.* at 2803-04. The concurrence addressed several

Sexual abuse of children in the United States is a grave societal

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types of procedural devices designed to protect child witnesses, including one-way or two-way closed circuit television. *Id.* at 2804. Justice O'Connor's view was that such devices would not violate a defendant's confrontation right if the child's testimony was given in the presence of the defendant or, in the alternative, if the defendant could see the witness through two-way closed circuit television. *Id.* The concurrence concluded that since the right to a face-to-face confrontation, although required by the clause, was not absolute, then even if protective devices were violative of the confrontation clause, they should be permitted where necessary "to further an important public policy." *Id.* at 2804-05. In Justice O'Connor's view, protection of child witnesses was such a policy. *Id.* at 2805; *see* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) (Eighth Circuit refused to uphold admission into evidence of videotaped deposition of adult women). In *Benfield*, the witness was a kidnap victim. *Id.* at 816. She subsequently became afraid to testify in the same room as the defendant and gave a videotaped deposition that was then used at trial. *Id.* at 817. The witness was not able to see the defendant, nor was she aware that the defendant watched her testimony. *Id.* The Eighth Circuit adhered to the Supreme Court's analysis that the right to confrontation includes the right to a face-to-face meeting and a right to cross-examine. *Id.* at 821. The *Benfield* court did not prohibit the use of electronic video equipment in a courtroom setting. *Id.* The court stated that face-to-face confrontation by using a two-way closed circuit television might be constitutional if there is a "showing of extraordinary circumstances necessitating reliance on the procedure." *Id.* at 822 n.11; *see* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (competing interest if closely examined may warrant dispensing with confrontation at trial); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (sixth amendment right of confrontation may be waived by consent or misconduct); Mattox v. United States, 156 U.S. 237, 243 (1895) (beneficial rules of law occasionally gave way to considerations of public policy and case necessity). *See generally* Libail, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 979 (1968) (identification by psychiatrists of components of legal proceedings capable of placing child under prolonged mental stress and endangered emotional equilibrium).

Justice Blackmun filed a dissenting opinion. *Coy*, 108 S. Ct. at 2805 (Blackmun, J., dissenting). Justice Blackmun reasoned that the primary purpose of the confrontation clause was to prevent the use of depositions or ex parte affidavits instead of live testimony at trial. *Id.* at 2805. The dissent's view was that an additional purpose of the clause was to ensure that the witnesses testify under oath and in the presence of the defendant. *Id.* (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)). Thus the clause ensured that witnesses were subject to cross-examination and that jurors could observe the witnesses as they testified. *Id.* at 2805. It was Justice Blackmun's view that all of those purposes were discharged in *Coy* and that the screen only prevented the witness' view of the defendant himself. *Id.* at 2806. Additionally, Justice Blackmun argued that, according to Wigmore, " '[T]here never was at common law any recognized right to an indispensible thing called confrontation *as distinguished from cross examination.*' " *Id.* at 2807 (quoting 5 J. WIGMORE, *supra* note 74, § 1397, at 158). The dissent argued that face-to-face confrontation was not absolute and "if it is justified by a sufficiently significant state interest," it may be dispensed with. *Id.* at 2808. Even though the majority declined to commit on the defendant's due process argument, Justice Blackmun opined that the screen employed by the state was not prejudicial to the extent of violating the defendant's due process rights. *Id.* at 2810. Justice Blackmun noted that the jury was instructed not to draw inferences of guilt from the use of the protective screen, and

problem that has gained considerable public attention in recent years.[113] In response to this important issue, legislatures throughout the country have sought to enact legislation which provides alternative methods for presenting testimony competent to produce conviction while safeguarding the victims from further emotional harm.[114] In pursuit of this goal, over one-half of the states have passed laws which ease unavailability requirements and allow the introduction of a child's

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that there were other courtroom practices which singled out the accused from others in the courtroom that had passed constitutional muster. *Id.*; *see* Holbrook v. Flynn, 475 U.S. 560, 565 (1986) (four uniformed troopers positioned behind defendant during trial held not to be prejudicial as to deny due process to defendant). *But see* Estelle v. Williams, 425 U.S. 501, 505 (1976) (appearance of defendant in prison attire held prejudicial); Illinois v. Allen, 397 U.S. 337, 344 (1970) (shackling and gagging defendant held prejudicial).

[113] *See, e.g.*, Mitchell, *Father Gets 25 Years in Sexual Abuse Case*, The Clarion-Ledger, Feb. 22, 1990, at B3, col. 3 (defendant convicted of sexual battery of his son; circuit judge stated that case "presented was the most extreme case of sexual child abuse I've ever heard and that covers quite a few of them"); Greenhouse, *Justices Limit Parent's Rights in Child Abuse Case*, N.Y. Times, Feb. 2, 1990, at A11, col. 3 (United States Supreme Court ruling that parent who is under continuing supervision of court for previously abusing child, must obey court order to disclose child's whereabouts notwithstanding disclosure might be incriminating); *see also, Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 77 (1984) ("the molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes") (statement of Senator Arlen Spector, Chairman Subcommittee on Juvenile Justice); Lacayo, *Sexual Abuse or Abuse of Justice?*, TIME, May 11, 1987, at 49 (indicating divergence of views surrounding legislative attempts to protect child witnesses in sex abuse cases); Greenhouse, *Court to Weigh Shielding Child in Abuse Cases*, N.Y. Times, Jan. 17, 1990, at A1, col. 2 (indicating that United States Supreme Court would review two state appeals to decide what steps states might take to shield child sex abuse victims and comport with sixth amendment confrontation clause); *Studies Find Sexual Abuse of Children Widespread*, N.Y. Times, May 13, 1982, at C1, col. 1 (indicating epidemic proportions of sexual abuse in United States).

[114] *See* Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U.L. REV. 1021, 1041-44 (1985) (state legislatures have enacted protective statutes in response to need to protect minor victims from potential trauma of testifying in open court which might lead to child's further mental stress); Note, *supra* note 89, at 806, 808 ("One in five females and one in eleven males are sexually victimized as children" resulting in state's broadening definitions of what constitutes child sexual abuse, extending statutes of limitations, and easing rules of evidence and procedure); Note, *Criminal Procedure—Child Witness—The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 642-45, 657-60 (1985) (society has become more aware of emotional impact upon child; thus judicial and legislative responses to lessen emotional stress on child witnesses have been promulgated).

testimony through closed-circuit television or videotaped statements.[115] Typically the statutes require that the child be unavailable to testify.[116] That is, a deposition videotaped under these statutes may be used in a subsequent trial as substantive evidence only if the prospec-

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[115] Among the states which have promulgated videotape deposition statutes are: ARIZ. REV. STAT. ANN. §§ 13-4251 to -53 (Supp. 1986); ARK. STAT. ANN. §§ 43-2035 to -37 (Supp. 1985); CAL. PENAL CODE §§ 1346-47 (West Supp. 1987); COLO. REV. STAT. § 18-3-413 (1986); DEL. CODE ANN. tit. 11, § 3511 (Supp. 1986); FLA. STAT. ANN. §§ 92.53-54 (West Supp. 1987); KAN. STAT. ANN. §§ 22-3433 to 3434 (Supp. 1985); KY. REV. STAT. ANN. § 421.350 (Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. §§ 15:440.01-440.6 (West Supp. 1987); ME. REV. STAT. ANN. tit. 15 § 1205 (Supp. 1986); MASS. ANN. LAWS ch. 278 § 16D (Michie/Law Co-op. Supp. 1987); MINN. STAT. ANN. § 595.02 (West Supp. 1987); MISS. CODE ANN. §§ 13-1-401 to -415 (Supp. 1989); MO. ANN. STAT. §§ 491.675-93 (Vernon Supp. 1987); MONT. CODE ANN. §§ 46-15-401 to -402 (1987); NEV. REV.STAT. § 174.227-31 (1985); N.J. REV. STAT. ANN. § 517:13-a (Supp. 1986); N.M. STAT. ANN. § 30-9-15 (1978); OKLA. STAT. ANN. tit. 10, §§ 1147-48 and tit. 22, § 753 (West Supp. 1987); PA. STAT. ANN. tit. 42, §§5981-88 (Purdon Supp. 1987); R.I. GEN.LAWS § 11-37-13.1 to -13.2 and § 40-11-7.2 (Supp. 1986); S.C. CODE ANN. § 16-3-1350(G) (Law. Co-op. 1986); S.C. CODIFIED LAWS ANN. §§ 23A-12-9 to -10 (Supp. 1987); TENN. CODE ANN. § 24-7-116 (Supp. 1986); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1987); UTAH CODE ANN. § 77-35-15.5 (Supp. 1987); VT. STAT. ANN., VT. R. EVID. 807 (Supp. 1986); WIS. STAT. ANN. § 967.04 (West Supp. 1987).

Some states have passed legislation allowing only closed-circuit transmission. Those states include: CONN. GEN. STAT. ANN. § 54-86 (Supp. 1987); GA. CODE ANN. § 17-8-55 (Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1986); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1987); N.Y. CRIM. PROC. LAW § 65.00-30 (McKinney Supp. 1987). Arizona, California, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Oklahoma, Pennsylvania, Texas, Utah, and Vermont allow for both videotape deposition and closed-circuit transmissions. There are other reforms or courtroom procedures which have been implemented by various jurisdictions, including: (1) liberalization of competency requirements of child witnesses; (2) establishment of special hearsay exceptions for child victim's statements made to persons to whom the child is confiding the details of his abuse; (3) speedy trials in sexual assault cases; (4) limitations on who can be present in courtroom during the child's testimony; and (5) greater use of expert testimony. Brief of Amicus Curiae, the American Bar Association at 12, Coy v. Iowa, 108 S. Ct. 2778 (1988) (No. 86-6757); *see, e.g.*, Tennessee v. Pilkey, 776 S.W.2d 943, 951 (Tenn. 1989) (use of ex parte videotaped testimony of child unconstitutional); *petition for cert. filed*, 58 U.S.L.W. 3399 (U.S. Nov. 10, 1989) (No. 89-773). In *Pilkey*, the lower court held that the videotaped statement of a minor, who was a child sexual abuse victim, violated both state and federal constitutional rights that guarantee the right of confrontation, even though under the Tennessee statute, the defendant would have been allowed to cross-examine the victim. *Pilkey*, 776 S.W.2d at 949-51. The question presented in the petition for certiorari by the United States Supreme Court is whether the use at trial of the *ex parte* videotaped statement of the child victim, who was available for cross-examination by the defendant at trial, constituted a violation of the defendant's right of confrontation under the sixth amendment.

[116] *See supra* notes 87-90 and accompanying text.

tive witness is "unavailable" to testify at trial.[117] While state evidence rules vary in defining "unavailability" for determining the admission of depositions, some states allow the use of depositions in place of live testimony if the witness suffers from physical or mental infirmity.[118] Thus, states enacting child sex abuse statutes often incorporate an expansion of the traditional methods of defining "mental or emotional infirmity" for purposes of unavailability.[119] The Mississippi legislature saw a need for protecting child witnesses and joined other states by enacting, in 1986, legislation which provided for procedural reform in the prosecution of child sexual assault cases.[120] The Mississippi stat-

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[117] *See supra* note 88 and accompanying text.

[118] *See supra* notes 113-14.

[119] *See* Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 684 & n.204 (1982) ("about half of the states include physical or mental infirmity as one of the possible forms of unavailability as a prerequisite to using the deposition in place of live testimony. This wording is broad enough to cover protection of the mental health of child witnesses").

[120] Evidence of Child Abuse Act, ch. 345 (1986) (codified at MISS. CODE ANN. §§ 13-1-401 to -415 (Supp. 1989). The Mississippi Legislature's attempt to provide statutory protection for a child witness in sexual abuse cases recently met strong judicial resistance. The rebuff centered around the legislature's attempted modification of the Mississippi Rules of Evidence in an effort to ease the burden of proving "unavailability" in child witness cases. In Hall v. State, 539 So. 2d 1338, 1341-48 (Miss. 1989), Justice Robertson, writing for the majority, declared that the Mississippi legislature had exceeded its authority by enacting the Evidence of Child Abuse Act since that act infringed the doctrine of separation of powers wherein the Supreme Court has the exclusive rule-making power regarding the Mississippi Rules of Evidence. *Id.* at 1346. At issue in *Hall* was the prosecution's attempt to use hearsay versions of a child's complaint against his father, by moving for and receiving a court order declaring the child "unavailable" as a witness prior to trial under MISS. CODE ANN. § 13-1-403(1)(c)(ii) (Supp. 1989). *Hall*, 539 So. 2d at 1340. The Mississippi Supreme Court noted that the effect of such a ruling would allow the out-of-court statements (hearsay) of the child made to two social workers to be admissible as evidence and hence support the prosecutor's charge. *Id.* at 1341. After finding the child "available" under the Mississippi Rules of Evidence, yet "unavailable" as defined by § 13-1-403 of the Evidence of Child Abuse Act, and thus supporting admissibility of the child's out-of-court statements, the court declared that it had previously "invoked its rule-making power and declared a codification of the hearsay rule and exceptions thereto." *Id.* at 1346. The court continued by explaining that its order implementing the Mississippi Rules of Evidence was the "ultimate authoritative declaration that the making of rules of evidence, and particularly rules regulating the use of hearsay evidence, lies on judicial turf." *Id.* Since trials were the "core" of judicial activity, so were the rules which regulate trials within the judiciary's province. *Id.* The court then declared that since the legislature was without power to "confer legal validity upon the Evidence of Child Sexual Abuse Act," the act had no legal validity and might not be regarded as 'law' within Rule 802, Miss.R.Ev." *Id.* (footnote omitted); *see also* Mitchell v. State, 539 So. 2d 1366, 1371 (Miss. 1989) (indicating that notwithstanding promulgation by legislature of special evidentiary provisions regarding admissibility of child's out-

utes, as originally promulgated, provide for use of both closed-circuit television and videotaping to show the child's testimony.[121] However, a recent Mississippi Supreme Court decision has made uncertain the ultimate fate of the child sexual assault statutes in Mississippi.[122]

The decision in *Coy v. Iowa* raises several important, yet unanswered, questions about the constitutionality of statutes, such as the one enacted in Mississippi, which provide for procedural devices designed to protect the child witness from the trauma of facing the defendant at trial.[123] The *Coy* decision may, for several reasons, be considered a narrow holding since it involved a statutory procedure unique to Iowa, a screening device, and statutory language devoid of a requirement that the prosecution show necessity that the procedure be

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of-court statements in child sexual abuse cases, court will continue to look to judicially passed-upon Mississippi Rules of Evidence in making evidentiary determinations).

Thus, it is impossible to predict the fate of the Evidence of Child Abuse Act. *Hall v. State* stands for the proposition that the statute is not valid law. *Hall*, 539 So. 2d at 1346. Of course, with such important public interest at stake as surrounds the issue of child sexual abuse in this state, it is hoped that the public policy of bringing sexual offenders to justice and allowing the use of statutory procedures which serve the interest of protecting the child victim from further trauma of testifying under the stare of the defendant will ultimately be allowed. Young victims are greatly harmed by sexual abuse; their lives can be and often are devastated. More frequently than one cares to admit, sexual abusers go free because evidence against them cannot be presented under present procedures; and children who do testify in court run the risk of being harmed again by an adversary system which forces them into direct contact with the one who harmed them. Thus, it seems when balancing the competing interests of the defendant's rights to confrontation and the child-victims' need for protection, videotaped testimony, testifying by closed circuit television, and relaxation of availability requirements provide viable compromises. Surely a compromise in this important public interest area can and will be formulated.

[121] MISS. CODE ANN. §§ 13-1-405, -407 (Supp. 1986) (provided for closed circuit television testimony and videotaped testimony of child sexual assault victims).

[122] *See supra* note 120. In *Hall*, the majority acknowledged the public concern for child sexual abuse. *Hall*, 539 So. 2d at 1347. However, the court noted that it would be unwise to quickly enact amendments to the Rules of Evidence, as the Evidence of Child Abuse Act does, without careful consideration of the consequences. *Id.* It was therefore the Court's recommendation that the subject of evidence of child sexual abuse be referred to the Advisory Committee on Rules, whose membership is composed of a cross-section of the bench, bar, and academia. *Id.* & n.22. Justice Robertson stated: "We take this means of referring to our Advisory Committee the entire subject of evidence of child sexual abuse and charge that with all deliberate speed the Committee study . . . [and] recommend whether . . . we ought to amend the Mississippi Rules of Evidence." *Id.* at 1348. The majority concluded by noting that, in the end, it would be the "Justices of this Court, who would decide whether to adopt or reject any amendment that the Advisory Committee recommended." *Id.*

[123] *See supra* notes 13, 110, 112, 115 120.

employed.[124] After finding the Iowa statue unconstitutional, Justice Scalia, who authored the *Coy* opinion, failed to answer whether there was an exception to the literal interpretation of the confrontation clause provision that an accused has a right to meet face to face with his accusers.[125] He stated only that "[w]e leave for another day the question of whether any exceptions exist."[126] Justices O'Connor and White made clear in their concurring opinion that the right to a face-to-face confrontation was not absolute.[127] They recognized the disturbing proportions of child abuse in today's society and specifically stated that nothing in the majority opinion in *Coy* precluded the efforts of state legislatures to protect child witnesses.[128] In addition, Justice Scalia made a special effort in his majority opinion to rebut points made by Chief Justice Rehnquist and Justice Blackmun in their dissent.[129] However, he made no comment at all about the concurring opinion and its specific reference to the possibility that the confrontation clause may give way to a case-specific finding of need and a state's compelling interest in protection of a child witness.[130] Nor did Justice Scalia indicate that Justices O'Connor and White had misconstrued his opinion.[131]

While it may be stated that important questions are thus left unresolved by the *Coy* opinion, several observations can be made as a result of the opinion.[132] First, the Court did not conclude that the con-

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[124] *See supra* notes 109, 112; Coyle, *Application of Confrontation Clause a Difficult Issue in Child Abuse Cases*, NAT'L L.J., Nov. 2, 1987, at 1, col. 2. Professor Paul J. Papak of the University of Iowa College of Law, who represented Coy before the United States Supreme Court, said that he wanted to recreate the scene of the courtroom where Coy was convicted so that he could have a feel for the screen's impact. *Id.* Professor Papak described his response to the reconstruction this way:

> It's hard to adequately describe its impact . . . . The Courtroom's lights were turned off, its blinds were drawn, and a panel of four, bright-focus lights were trained onto the scene in order to activate the one-way coating.
>
> The two girls could see only the reflection of the judge's bench next to them . . . . The defendant saw a darkened image of the two witnesses. In the trial record, . . . the judge described the effect as "dramatic" and eerie.

Id. at 10, col. 1.

[125] *See supra* note 110.

[126] *Id.*

[127] *See supra* notes 13, 112.

[128] *See supra* note 112.

[129] *See supra* note 108.

[130] *See supra* notes 13, 112.

[131] *See supra* notes 104-12 and accompanying text.

[132] *See supra* notes 13, 104-12.

frontation clause absolutely requires a "face-to-face" meeting.[133] Although the majority opinion does not reveal or admit to "any" exceptions, it implies that there may be some by leaving the question open "for another day."[134] Second, the opinion does not foreclose the possibility of recognizing an exception to a face-to-face meeting if there is a compelling state interest to protect a child witness from the additional trauma of testifying in the presence of the accused.[135] Third, there remains some difficulty in precisely interpreting Justice Scalia's true intent in leaving open the possibility of allowing an exception based on a case-specific finding of necessity.[136] One could advocate interpreting the tenor of the majority opinion to say that no exception can be found even if a case-specific need is determined under a particular statute.[137] However, if that was Justice Scalia's true intent, then it must be asked why he did not negate the implication propounded by the concurring opinion, which espoused a much more accommodating view—that is, that a case-specific finding of necessity might create an exception to the confrontation clause if it should be necessary to further an important public policy.[138] Finally, it should be noted that even if a strict interpretation was intended by Justice Scalia, that view can be said to be embraced by no more than four of the Justices.[139] Considering the concurrence, the two dissenting Justices, and the non-participation of Justice Kennedy, whose views are not yet known on the subject, the

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[133] *See supra* note 110 and accompanying text.

[134] *See supra* note 110.

[135] *See supra* notes 104-12.

[136] *See supra* note 110.

[137] *See supra* notes 110, 112, 114, 115.

[138] *See supra* note 112 and accompanying text; *cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 (1982) (supports requirement of showing "necessity" in context of protecting child witnesses). In *Globe*, the Court, in holding a Massachusetts statute which mandated exclusion in all cases unconstitutional, stated that even though the interest of protecting child victims of sexual assault was a compelling interest, it did not justify a mandatory closure rule. *Id.* at 607-08. The Court explained that the circumstances of a particular case could and usually would be determinative of the significance of the interest. *Id.* The Court stated that a trial court should therefore make the determination of whether exclusion was necessary. *Id.* at 608. Factors such as the victim's age, psychological maturity, understanding of what was expected, the nature of the crime, the victim's wishes, and the parents' interest were factors for the trial court to consider. *Id.* The Court articulated the rationale for a finding of necessity by noting that "[s]uch an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the state's interest." *Id.* at 609.

[139] *See supra* note 112; Justice Scalia was joined by Justices Brennan, Marshall, O'Connor, Stevens, and White.

Coy opinion perhaps leaves uncertain the fate of statutes such as Mississippi's, which provide for case-specific findings of possible trauma to child witnesses.[140]

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[140] *See supra* notes 120, 121, 123 and accompanying text. As originally enacted, MISS. CODE ANN. § 13-1-411 provided a basis upon which behavioral indicators could be used to determine the applicability of the protective procedures provided for by the statutes—that is, evidence that a child has suffered or might suffer further emotional distress if compelled to testify in open court. MISS. CODE ANN. § 13-1-411 (Supp. 1989). A number of jurisdictions have, since the *Coy* decision, addressed the primary issue raised in that case of the defendant's literal right to confront witnesses. Many, if not most, of these cases have dealt with state statutes like the one at issue in *Coy* that seek to protect child witnesses when testifying at trial. *See, e.g.*, United States v. Iron Moccasin, 878 F.2d 226, 230 (8th Cir. 1989) (where easel which displayed diagram was placed between defendant and accuser, no intentional view-blocking in violation of defendant's confrontation right occurred); Nelson v. Farrey, 874 F.2d 1222, 1226-27 (7th Cir. 1989) (psychologist's testimony about statements made to him by child sexual assault victim did not literally violate confrontation right of defendant since child was only "indirect witness"); Lam v. Iowa, 860 F.2d 873, 875 (8th Cir. 1988) (admission of videotaped testimony of burglary victim violated defendant's right to confront witnesses against him where witness was absent because of previously scheduled vacation and not otherwise unavailable), *cert. denied*, 109 S. Ct. 2072 (1989); State v. Vincent, 159 Ariz. 418, 768 P.2d 150, 152 (1989) (Arizona's child witness statute unconstitutionally applied where state used videotaped testimony of defendant's children absent showing of individualized finding of necessity); State v. Wilhite, 160 Ariz. 228, 772 P.2d 582, 586-87 (Ct. App. 1989) (admission of videotaped rather than live testimony where lack of individualized findings demonstrated necessity to do so violated defendant's confrontation right); State v. Alvarado, 158 Ariz. 89, 761 P.2d 163, 167 (Ct. App. 1988) (confrontation clause violated when deposition admitted without waiver of defendant's rights to be present); Smart v. State, 297 Ark. 324, 761 S.W.2d 915, 917-18 (1988) (hearsay statements of eight-year-old sexual abuse victim made to others were admissible even though victim was present and testified at trial of accused); People v. Thomas, 770 P.2d 1324, 1327-28 (Colo. Ct. App. 1988) (procedure which allowed testimony of child under 13 to be taken outside courtroom in sexual assault case was not violative of defendant's confrontation right where individualized findings of need required before procedure implemented), *cert. denied*, 110 S. Ct. 322 (1989); State v. Bonello, 210 Conn. 51, 554 A.2d 277, 280 (1989) (right to face-to-face confrontation is not absolute), *cert. denied*, 109 S. Ct. 2103 (1989); State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245, 1256 (1987) (in criminal prosecutions for child sexual abuse, videotaping testimony of child outside presence of defendant is constitutionally permissible where state procedure provides that proof by clear and convincing evidence of compelling need be shown), *cert. denied*, 484 U.S. 1061 (1988); Glending v. State, 536 So. 2d 212, 216-18 (Fla. 1988) (allowing child sexual abuse victim's testimony to be videotaped as provided by Florida statute did not violate defendant's right to confront witness), *cert. denied*, 109 S. Ct. 3219 (1989); Sampson v. State, 541 So. 2d 733, 735 (Fla. Dist. Ct. App. 1989) (allowing victim of sexual abuse to testify by closed-circuit television outside defendant's presence did not violate confrontation right of accused); Ortiz v. State, 188 Ga. App. 532, 373 S.E.2d 92, 94-95 (Ct. App. 1988) (trial court did not violate confrontation right of defendant to confront witness by allowing victims to sit at angle where they would not directly face defendant); State v. Wright, 116 Idaho 382, 775 P.2d 1224, 1226-

The Mississippi statutes as originally promulgated provide for tes-

28 (since hearsay rules and confrontation are not coextensive, evidence admissible as hearsay exception may nevertheless violate defendant's confrontation right), *cert. granted sub nom.* Idaho v. Wright, 110 S. Ct. 833 (1990); State v. Giles, 115 Idaho 984, 772 P.2d 191, 195 (1989) (applying catchall exception to hearsay rule to allow statements of three-year-old sexual assault victim as evidence at defendant's trial); People v. Bastien, 129 Ill. 2d 64, 541 N.E.2d 670, 672-74 (1989) (state statute which authorized videotaping of child sexual abuse victims' oral testimony and prohibited contemporaneous cross-examination impermissibly infringed defendant's confrontation right); State v. Hoversten, 437 N.W.2d 240, 241-42 (Iowa 1989) (defendant's confrontation rights were not violated by placement of one-way mirror between defendant and sexual assault victim where court made finding that child was suffering from post-traumatic stress syndrome), *cert. denied*, 110 S. Ct. 212 (1989); State v. Eaton, 244 Kan. 370, 769 P.2d 1157, 1162-63 (1989) (permitting child victim of sexual assault to testify by closed-circuit television violated defendant's sixth amendment confrontation right); State v. Murphy, 542 So. 2d 1373, 1377 (La. 1989) (state statute which required court to ensure that child victim of sexual abuse could not see or hear defendant unless such viewing was requested for purposes of identification violated defendant's confrontation right); Craig v. State, 316 Md. 551, 560 A.2d 1120, 1225-27 (1989) (confrontation right denied where defendant in child sexual abuse case was separated from sexual assault victims and testimony conducted via one-way closed-circuit television so that witnesses could not see defendant), *cert. granted sub nom.* Maryland v. Craig, 110 S. Ct. 834 (1990); Commonwealth v. Tuffs, 405 Mass. 610, 542 N.E.2d 586, 589-90 (1989) (videotaping of child sexual abuse victim's testimony in defendant's presence did not deny defendant confrontation right notwithstanding contention of defendant that his positioning prevented eye contact with witness); State v. Conklin, 444 N.W.2d 268, 272 (Minn. 1989) (statute permitting testimony of child witness to be taken outside presence of defendant was not unconstitutional on its face where specified findings or necessity were required); Hall v. State, 539 So. 2d 1338, 1346 (Miss. 1989) (state statute dealing with child sexual abuse is invalid since Mississippi Supreme Court has sole power to modify rules of evidence); State v. Davidson, 764 S.W.2d 731, 734 (Mo. Ct. App. 1989) (admission of videotaped deposition of child sexual abuse victim violated defendant's confrontation right in absence of evidence that child would suffer trauma if required to testify); State v. Smith, 765 P.2d 742, 743-44 (Mont. 1988) (confrontation clause does not require allowing defendant to be physically present at his attorney's interview with victim); State v. Crandall, 231 N.J. Super. 125, 555 A.2d 35, 38-39 (Ct. App. Div. 1989) (statutory provision for closed-circuit television testimony does not violate confrontation clause because of specific finding of need); State v. Davis, 229 N.J. Super. 66, 550 A.2d 1241, 1245 (Ct. App. Div. 1988) (since New Jersey statute requires finding of "substantial likelihood" that witness will suffer emotional distress, statute passes constitutional muster of *Coy*); People v. Tucik, 147 A.D.2d 899, 537 N.Y.S.2d 355, 356 (App. Div. 1989) (defendant's confrontation right was not violated when seven-year-old sodomy victim was permitted to sit at table facing jury because testimony was inaudible from witness stand); State v. Eastham, 39 Ohio St. 3d 307, 530 N.E.2d 409, 411-12 (1988) (procedure which allowed child to testify in separate room and have her testimony transmitted via videocamera to monitor in courtroom violated defendant's confrontation right); Commonwealth v. Groff, 378 Pa. Super. 353, 548 A.2d 1237, 1249-50 (Super. Ct. 1988) (trial court did not violate state or federal confrontation clause by telling child victim that she did not have to look at defendant while testifying); State v. Taylor, 562 A.2d 445, 448 (R.I. 1989) (to avoid violation of defend-

timony to be taken outside the presence of the defendant if his or her presence would cause a "substantial likelihood" of mental or emotional distress to the child.[141] Section 13-1-411 of the Mississippi Code[142] defines what "specific behavioral indicators" a court would consider in making its determination of whether a child has suffered or might suffer additional emotional trauma.[143] Therefore, section 13-1-411 as originally enacted certainly provides the Mississippi statutes with an important element missing from the unconstitutional statute in *Coy*.[144] Additionally, the *Coy* holding did not indicate an intent to overrule the decisions of *Roberts* and *Inadi* or other decisions which have allowed extra-judicial declarations at trial.[145] Accordingly, if Justice Scalia was in effect saying that a face-to-face meeting must always be required in every case, then the holdings in those cases would be effectively overruled.[146] If Justice Scalia and the majority did not take an absolute and unyielding view, then perhaps the interpretation given by the concurring opinion provides the better guide by reasoning that *Coy* does not absolutely forbid the use of protective procedures in child sexual assault cases, for in her concurring opinion, Justice O'Connor posited that "[w]hile I agree with the Court that the confrontation clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child

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ant's confrontation right through admission of videotaped testimony, state must show by clear and convincing evidence that child victim would suffer unreasonable and unnecessary harm from testifying before open court); Powell v. State, 765 S.W.2d 435, 436-37 (Tex. Crim. App. 1989) (procedural rules allowing child to testify via videotape to avoid giving in-court testimony violated defendant's state and federal confrontation rights); State v. Murray, 375 S.E.2d 405, 411-12 (W. Va. 1988) (defendant's right of confrontation was violated where child sexual assault victim testified and defendant was positioned by court so that he was unable to view witness and witness was unable to view him); State v. Thomas, 150 Wis. 2d 374, 442 N.W.2d 10, 17-18 (1989) (statute which allowed videotaped testimony of child sexual assault victim's testimony and placement of screen between child and defendant did not violate defendant's confrontation right where defendant was present in same room and could see victim on television monitor as she testified), *cert. denied*, 110 S. Ct. 188 (1989).

[141] *See supra* notes 121, 140.

[142] MISS. CODE ANN. § 13-1-411 (Supp. 1989).

[143] *See supra* note 140.

[144] *See supra* notes 6, 13, 140.

[145] *See supra* notes 78-91, 108 and accompanying text.

[146] *See supra* notes 104-12.

witnesses," thus reserving for another day a decision on the approaches promulgated by many states, including Mississippi.[147]

J. Grant Sellers

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[147] *See supra* note 112 and accompanying text.

Family Law — Marital Property Distribution — Where Divorcing Spouse Contributed to Acquisition of Marital Real Property, Court-Ordered Divestment of Title Was Equitable

Plaintiff[1] filed suit in the Chancery Court of Rankin County seeking a divorce on the grounds of habitual cruel and inhuman treatment[2] and requesting, *inter alia*, an equitable division of the parties' jointly accumulated real property.[3] After granting plaintiff a divorce,[4] the trial court equitably divided[5] the couple's real estate holdings by completely

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[1] Plaintiff Eunice Rebecca (Becky) Lucius Jones had married the defendant Fred Milton Jones on December 24, 1954, and had two children of the marriage, Deeta Rebecca Jones Davis and Lucia Lynn Jones. Jones v. Jones, 532 So. 2d 574, 575 (Miss. 1988).

[2] *Id.* at 577. During three separate arguments, Mr. Jones had allegedly beaten his wife with a belt, broken her nose and blackened her eye. *Id.* at 578. Mr. Jones had also allegedly subjected his wife to continual physical threats. *Id.*

[3] *Id.* at 577. Title to the real property at issue in the case changed between the parties throughout their marriage. *Id.* In 1972, appellant was diagnosed as having a brain tumor, and because he believed he was dying, he executed deeds conveying all of his real property to his wife. *Id.* These deeds were recorded. *Id.* Plaintiff, in turn, executed reciprocal deeds which she did not record and which she subsequently destroyed. *Id.* For the next 10 years, the couple continued to accumulate real estate, and the defendant continued to deed all of his real property to plaintiff, who then executed deed-backs which likewise remained unrecorded. *Id.* However, in 1983, plaintiff executed deeds conveying all the properties back to defendant. *Id.* These deeds were recorded in 1984. *Id.*

Real properties in Fred Jones' name included an undeveloped residential lot, valued at $6,770; the Joneses' residence, valued at $49,260; two adjacent undeveloped residential lots, valued at $15,000; an undeveloped eight-acre tract, valued at $40,000; Jones Shopping Center, valued at $718,830; and 16 cemetery lots of undetermined value. *Id.* Also at issue were three lots held by third parties, including two undeveloped residential lots, owned by the Joneses' daughter, Deeta Davis, *id.* at 577, and valued at $7,500 each, *id.* at 581, and a chicken farm, owned by Mrs. Jones' brother, Ray Lucius, *id.* at 577, and valued at $49,270, *id.* at 581. Mrs. Jones had conveyed these properties to the above mentioned family members without Mr. Jones' knowledge or consent. *Id.* at 578.

[4] *Id.* at 577. The chancellor found sufficient evidence to support plaintiff's claim of habitual cruel and inhuman treatment. *Id.*

[5] *Id.* The chancellor ruled that the property had been accumulated through the joint efforts by the Joneses and specifically found that Mrs. Jones had contributed to the acquisition and maintenance of these properties. *Id.* In the early years of the marriage, Mrs. Jones worked to support the couple while her husband attended high school and college. *Id.* at 576. She used money earned as a billing clerk to purchase several lots and to develop a mobile home park. *Id.* In 1959, she discontinued her clerking job just prior to the birth of their eldest daughter, but she continued to contribute her secretarial and

divesting the defendant of his title and interest in three parcels of real property and by ordering the defendant to convey an undivided two-fifths interest in six others.[6] On appeal, the Mississippi Supreme Court, *held*, affirmed.[7] Where a divorcing spouse contributes to the joint accumulation of real property titled solely in the name of the other spouse, the contributing spouse holds an equitable interest which may be effected by a transfer of title incident to divorce. *Jones v. Jones*, 532 So. 2d 574, 581 (Miss. 1988).

At common law, chancery courts lacked the authority to divest one spouse of title to marital property[8] and then vest title in the other spouse pursuant to a divorce decree.[9] This title theory, as it came to be known,[10] grew out of concern that chancellors were mixing the separate principles of alimony[11] and property distribution in divorce decrees.[12]

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bookkeeping skills to the family's real estate business. *Id.* She continued that assistance throughout the period when various properties were accumulated and at one point took over the management of the shopping center after Mr. Jones suffered a nervous breakdown. *Id.* at 577.

[6] *Id.* at 577. The chancellor specifically ordered Mr. Jones to vest two-fifths undivided interest to the six parcels in Mrs. Jones and to convey all of his title to the three other properties to Mrs. Jones. *Id.* at 578 n.4.

[7] *Id.* at 580-81. The court held that Mrs. Jones had contributed substantially to the acquisition of the real properties. *Id.* Furthermore, the court found authority that justified the ruling of the chancellor. *Id.* at 580. On the collateral issue of whether Mrs. Jones should be granted a divorce, the court found sufficient evidence to sustain the findings of habitual cruel, and inhuman treatment. *Id.* at 578.

[8] L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY § 5.02, at 93 (1983). Marital property has been generally defined as real or personal property acquired by either spouse during the marriage. *Id.* It might also include intangible possessions such as pension rights, licenses, and a professional education. *Id.* § 5.02, at 97.

[9] MISS. CONST. art. VI, § 159. The chancery courts in Mississippi have full jurisdiction in divorce matters. *Id.*

[10] Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 455 (1988). In states which follow the common-law rule of the title theory, distribution of marital property is based on title alone, and the chancery courts in these states are not authorized to make equitable distributions of property. *Id.* Community property states allow their courts to equally divide marital property. Rheinstein, *Division of Marital Property*, 12 WILLIAMETTE L. REV. 413, 420 (1976). The equitable distribution theory involves dividing marital property based upon the contributions of each spouse toward acquiring the property without regard to title. Clause & Perry, *Family Law: Equitable Distribution and Proper Valuation of Marital Property*, 20 IND. L. REV. 211, 212 (1987).

[11] J. BUNKLEY & W. MORSE, DIVORCE AND SEPARATION IN MISSISSIPPI § 6.00, at 178 (1957). The husband's obligation to pay alimony to his wife was rooted in his duty to support the wife when a marriage terminated. *Id.* Alimony awards in American divorces derived from a similar process in the English ecclesiastical courts. H. CLARK, LAW OF DOMESTIC RELATIONS § 14.1, at 420 (1968). At one time the amount of alimony awarded depended on the marital conduct of the parties. *Id.* 14.1, at 422. Gradually, alimony

Although Mississippi had been a longtime adherent to the title theory,[13] the Mississippi Supreme Court had ruled to the contrary[14] prior to its decision in *McCraney v. McCraney*.[15]

In *McCraney*, the wife sought a divorce and alimony from her husband who had allegedly committed adultery.[16] The supreme court ruled that the chancellor erred when he divested the husband of title to real property[17] as a means to pay alimony[18] to the wife.[19] Furthermore, the supreme court held that the chancellor erred in declaring that the divorce decree[20] operated as a conveyance.[21] Finding no authority that allowed divestment, the supreme court ruled that the husband deserved sole title to the property.[22] A year later, however, the court departed from the tenor of the title theory in *Chrismond v.*

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awards were extended to include amounts necessary for the support of children. *Id.*

[12] H. CLARK, *supra* note 11, § 14.8, at 449. In common-law title states, the original method of property division was to determine ownership without equitable considerations. *Id.* Property was distinguished from alimony on the basis that alimony orders were generally subject to modification and could be enforced by contempt of court while property division orders were not subject to further review. *Id.* Furthermore, alimony, unlike property orders, ended on remarriage of the wife; and marital misconduct was sometimes considered in alimony awards, but not in property division. *Id.* Some courts began to merge alimony and property distribution in cases where a property grant provided better support for the wife and children. *Id.* § 14.8, at 451. At common-law, however, the courts could not combine the two, absent statutory authority. *Id.* § 14.8, at 449.

[13] Freed & Walker, *supra* note 10, at 453. In fact, until the *Jones* decision, Mississippi continued to be the only state that adhered to the common-law title theory. *Id.*

[14] *See* Griffin v. Griffin, 207 Miss. 500, 505, 42 So. 2d 720, 722 (1949)(chancellor's title divestment authority unchallenged); *see also* Hemphill v. Hemphill, 197 Miss. 783, 791, 20 So. 2d 79, 81 (1944)(prior conveyance agreement between couple upheld); Harris v. Worsham, 164 Miss. 74, 79, 143 So. 851, 852 (1932)(title divestment upheld).

[15] 208 Miss. 105, 43 So. 2d 872 (1950).

[16] *McCraney*, 208 Miss. at 107, 43 So. 2d at 873. The wife failed to prove her claim by clear and convincing evidence, and the court dismissed the complaint. *Id.* at 111, 43 So. 2d at 875.

[17] *Id.* at 107, 43 So. 2d at 872. The real property at issue was the couple's home, which was titled in the husband's name. *Id.*

[18] *Id.* The chancellor's decree specifically stated that the wife "[should] have by way of alimony the fee simple title to the property described in the bill." *Id.* at 107, 43 So. 2d 873.

[19] *Id.* at 107, 43 So. 2d at 872. The court noted that the chancellor in an appropriate case could order payment of alimony in lump sum or in monthly installments. *Id.* In addition, the chancellor could put a lien on real property as security for alimony payments. *Id.* at 108, 43 So. 2d 873.

[20] *Id.* at 107, 43 So. 2d at 873. The ruling of the chancellor provided "that this decree shall operate as a conveyance to her of a fee simple title to the said property." *Id.*

[21] *Id.*

[22] *Id.*

Chrismond.[23]

In *Chrismond*, the supreme court upheld a court-ordered title[24] transfer to a putative wife[25] who had in good faith entered into a void marriage.[26] Without overruling *McCraney*,[27] the court relied on judicial decisions[28] from other states that had recognized a chancellor's equitable power to protect the property rights of putative spouses.[29]

After its decision in *Chrismond*, the court in *Windham v. Windham*[30] denied a request for equitable title made by a legally married wife who had through her physical labor helped her husband maintain his real property.[31] In making its decision, the court relied on the rule established in *McCraney* that prohibited divestment of title from one spouse for the benefit of the other.[32] Furthermore, the court held that since the wife did not contribute to the original purchase of the land, she was not entitled to an interest by way of a resulting

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[23] 211 Miss. 746, 52 So. 2d 624 (1951).

[24] *Chrismond*, 211 Miss. at 757, 52 So. 2d at 628. Although the putative husband owned much of the property, the wife claimed that she was due an equitable share because of the contributions that she had made toward its accumulation. *Id.* at 752, 52 So. 2d at 626. In addition to providing personal care to her crippled husband, the wife helped operate his confectionery business, at times working seven days a week. *Id.* Through their joint efforts they accumulated a farm and other real property valued at $40,000. *Id.* at 753, 52 So. 2d at 626.

[25] *Id.* The Chrismonds participated in two ceremonial marriages. *Id.* at 752, 52 So. 2d at 626. Each time, however, the husband failed to mention that he was married to another woman. *Id.*

[26] *Id.* at 753, 52 So. 2d at 628. A putative wife could not receive alimony because of Mississippi case law requiring a valid marriage as a precondition for any alimony award. *Id.* at 756, 52 So. 2d at 628 (citing Reed v. Reed, 85 Miss. 126, 127, 37 So. 642, 642 (1905)).

[27] *Id.* at 757, 52 So. 2d at 628. The decision in *McCraney* was not applicable to *Chrismond*, the court reasoned, because *Chrismond* involved an invalid marriage. *Id.*

[28] *Id.* at 758, 52 So. 2d at 629; *see* Werner v. Werner, 59 Kan. 359, 362, 53 P. 127, 129 (1898)(alimony rule requiring valid marriage did not bar equitable property division); *see also* Krauter v. Krauter, 79 Okla. 30, 32, 190 P. 1088, 1089 (1920)(court upheld equitable division favoring putative spouse).

[29] *Chrismond*, 211 Miss. at 754, 52 So. 2d at 627. The court agreed with the chancellor and concluded that the husband should be prohibited from using his bigamous status to defeat a claim of equity. *Id.*

[30] 218 Miss. 547, 67 So. 2d 467 (1953).

[31] *Windham*, 218 Miss. at 552, 67 So. 2d at 469. A court of equity lacks the authority to divest one spouse of title to real property and then vest the title in another. *Id.* at 559, 67 So. 2d at 470.

[32] *Id.* at 557-58, 67 So. 2d at 471. The court recognized the earlier conflicting opinions concerning title divestment, but then held that *McCraney* was the controlling decision. *Id.*

trust.[33] Had she contributed to the purchase of the property, the court reasoned, then a trust would have developed for her behalf even if her husband held sole legal title to the property.[34]

In *Cox v. Cox*,[35] decided thirteen years after *Windham*, the court again denied a wife equitable title to her husband's real property and ruled that her manual farm labor was merely one of her duties in exchange for her husband's support.[36] The wife contended that she and her husband accumulated the property through joint efforts and that she was therefore entitled to an undivided one-half interest in the property.[37] The court noted the extent of the support given by the wife, but it refused to rule contrary to the common-law title doctrine.[38] Although the wife signed the purchase money mortgage and worked to pay off the debt, the court again refused to recognize title through a

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[33] *Id.* at 555, 67 So. 2d at 470. A resulting trust could arise only in the same transaction in which legal title passed and not from subsequent contributions or considerations. *Id.* (citing Moore v. Moore, 74 Miss. 59, 63, 19 So. 953, 954 (1896)).

[34] *Id.* In Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1956), the court left unsettled the issue of whether a wife could claim title to her husband's personal property upon divorce. *Id.* at 557, 80 So. 2d at 756. In *Duvall*, the legally separated parties previously agreed that the wife had a one-half interest in the personal property, and therefore the court refused to address any substantial equitable claim that would arise absent an agreement. *Id.*

Despite the wife's uncompensated services to the business owned by her husband, in Brabham v. Brabham, 266 Miss. 165, 177, 84 So. 2d 147, 151 (1955), the court denied the wife equitable title to the business property because she did not contribute to the original purchase of the business. *Id.*

Between the late 1950's and the 1960's, the court in Drummond v. Drummond, 248 Miss. 25, 156 So. 2d 819 (1963) applied the common-law rule to title claims involving bank accounts and held that joint accounts are vested in the names as given as equal contributors. *Id.* at 31, 156 So. 2d at 821. The *Drummonds* court was unable to determine the amount each spouse contributed to the account and allowed the husband to maintain his equal title to the property. *Id.* In the same case, however, the court denied a claim by the wife to property titled in the husband because the court failed to find an intent to create title in her name. *Id.* at 33, 156 So. 2d at 822.

The court applied the common-law title rule to the distribution of stock in Rosamond v. Rosamond, 250 Miss. 742, 749, 168 So. 2d 294, 297 (1964). In *Rosamond*, the wife was the sole contributor to the purchase of jointly-titled stock, but the court, citing the common-law title rule, refused to divest the husband of his interest. *Id.* at 748-49, 168 So. 2d 297.

[35] 183 So. 2d 921 (Miss. 1966).

[36] *Cox*, 183 So. 2d at 924. The court denied the wife an interest because she had abandoned her husband without reason. *Id.*

[37] *Id.* at 923. By the time of divorce, in addition to the farm, the couple had accumulated furniture, livestock and about $1,800. *Id.* at 922.

[38] *Id.* at 924. The wife's manual labor included operation of a tractor and general work in the fields. *Id.* at 922.

resulting trust absent evidence of actual monetary contributions to the purchase.[39]

An indication that the title theory was penetrable[40] came in the decision of *Buckalew v. Stewart*.[41] In refusing to find the husband in contempt of a child support order,[42] the court ruled that the previous decree of the chancellor requiring the husband to surrender possession of the homestead and the husband's subsequent voluntary divestment of full title to his former wife were efforts through property distribution to provide economic support for the wife and children.[43] Since the homestead, a farm, was a potential source of income for the wife and children, the court found that the chancellor properly allowed the husband credit on separate child support payments.[44] In addition, the court stated that a chancellor could place a lien on real property as security for support awards, thereby effecting a possible divestment of title from the debtor spouse for the benefit of the other if the property were sold.[45]

Despite *Buckalew*, the common-law title theory still surfaced in the supreme court's decisions.[46] Through statutes and judicial decisions, however, other states during the 1970's injected more equitable and expansive approaches to alimony and property distribution.[47] The

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[39] *Id.* at 923.

[40] *See* H. CLARK, *supra* note 11, § 14.8, at 449 (at common law property distribution as substitute for alimony or child support was prohibited).

[41] 229 So. 2d 560 (Miss. 1969).

[42] *Buckalew*, 229 So. 2d at 562. The chancellor ordered the husband to pay $30 per week in child support payments with half the payments credited in advance. *Id.*

[43] *Id.* Thus, the supreme court in essence allowed a merger of the traditional notions of alimony and property distribution, contrary to the rationale behind the title theory. *See* H. CLARK, *supra* note 11, § 14.8, at 449 (combination of alimony and property distribution prohibited at common-law).

[44] *Buckalew*, 229 So. 2d at 562. The court also ruled that since the husband had relinquished title to his home and had had several judgments against him, the chancellor, on remand, should determine whether the wife could contribute a portion of her income to support the children. *Id.* at 563.

[45] *Id.* at 562.

[46] *See* Sheperd v. Sheperd, 336 So. 2d 497, 499 (Miss. 1976)(divorce did not destroy joint tenancy with right of survivorship, therefore divestment of title in surviving spouse was not permitted upon death of former spouse); Bridges v. Bridges, 330 So. 2d 260, 263 (Miss. 1976)(chancellor erroneously divested husband of title by judicial fiat when chancellor ordered husband to sell his home and use proceeds to build new home for former wife); Hudson v. Hudson, 284 So. 2d 299, 300 (Miss. 1973)(consent decree with vague language remanded for clarification of prohibition against divestment of title in husband for benefit of wife).

[47] Freed & Foster, *Economic Effects of Divorce*, 7 FAM. L.Q. 274, 339 (1973). As of June, 1973, only 16 common-law property states, including Mississippi, denied courts the

Mississippi Supreme Court entered this new era with its decision in *Jenkins v. Jenkins*.[48] The *Jenkins* court awarded separate lump-sum alimony in recognition of a housewife's contribution[49] to the accumulation of property titled in her husband's name.[50] In light of the declining economic status of the wife upon divorce,[51] the court held that it was proper to award the housewife extra money based on her domestic contributions.[52]

In *Clark v. Clark*,[53] the Mississippi Supreme Court awarded equitable lump-sum alimony where the wife forewent a career as a cosmetologist due to her husband's request to work in his business.[54] In addi-

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authority to equitably distribute property. *Id.* In a growing trend, traditional alimony awards were based more on economic needs with less emphasis on marital misconduct. *Id.* at 277. Property distribution incident to divorce was considered analogous to the break-up of a partnership with similar equitable results. *Id.*

[48] 278 So. 2d 446 (Miss. 1973).

[49] *Jenkins*, 278 So. 2d at 449; Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. Rev. 1269, 1311 (1981). A homemaker's economic contributions generally are recognized on the basis of her managerial skills and the savings to the family resulting from her efforts. *Id.* at 1311. These contributions were traditionally overlooked since they did not produce income. *Id.* By 1981, however, Mississippi joined at least 14 other states that consider a homemaker's services when awarding support incident to divorce. *Id.* at 1311 n.223.

[50] *Jenkins*, 278 So. 2d at 448. At the time of the divorce, the husband's annual income was $157,747 and his assets totaled $800,000. *Id.* The wife was 46 years old and had worked solely as a housewife and mother. *Id.* at 448. Her assets included a one-half interest in the marital home and a small amount of money in a checking account. *Id.* The chancellor initially awarded the wife $1,000 in monthly alimony, but the supreme court on remand ordered a larger monthly sum in addition to the separate lump-sum. *Id.* at 450.

[51] *Id.* at 450. Older, unemployed women who had been married for a long time generally suffered extreme economic losses upon divorce because, unlike younger divorcing women, they must depend greatly on their ex-husbands for continued support. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1182 (1981). Divorced men however, usually experience improved economic positions. *Id.* at 1251. The disparate results stem from the different economic needs of husbands and wives following divorce. *Id.* at 1252. Generally, divorced women with children experience an increase in financial need but a decrease in resources, and child support payments are at times inadequate to make up the difference. *Id.* Husbands experience a decrease in these types of economic demands after divorce and are more likely to receive salary increases. *Id.* at 1253.

[52] *Jenkins*, 278 So. 2d at 449. In overturning the chancellor's award, the court stated the alimony should reflect the standard of living to which the wife had become accustomed and provide for future security. *Id.* at 450.

[53] 293 So. 2d 447 (Miss. 1974).

[54] *Clark*, 293 So. 2d at 448. Testimony indicated that the wife worked full time, six days a week, doing general secretarial duties. *Id.* She also managed the family's construction company and real estate office, and she undertook many of her husband's duties as a

tion to her twelve years of uncompensated labor in her husband's business, the wife worked as a homemaker as well.[55] After determining that the chancellor's alimony award of $200 per month was grossly inadequate, the court ordered an additional lump sum[56] that would reflect her uncompensated contributions to the acquisition of the husband's property.[57] Leaving the common-law theory still intact by prohibiting access to the husband's real property,[58] the *Clark* court stated that it did not espouse a community property theory in the distribution of marital assets.[59]

By 1978,[60] it was evident that the court still adhered to the title theory in some cases.[61] In *Wray v. Langston*,[62] however, the court enforced a property settlement between spouses although the agreements

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housing authority executive. *Id.*

[55] *Id.* at 449.

[56] *Id.* The wife did not receive a one-half interest in a jointly held savings account containing $63,500 since title to the account, the court reasoned, was intended for the wife only if she survived her husband. *Id.* at 450.

[57] *Id.* at 448. The husband owned 700 acres of land with timber and mineral interests, a savings account, stock in a local bank, rental houses, a family income, interest in a subdivision lot, and $5,000 in miscellaneous assets. *Id.* at 449.

[58] *Id.* at 450. The court did not require the husband to compensate the wife by divestment of title to real property. *Id.*

[59] *Id.* The court rejected a claim by the wife to half the funds deposited in savings accounts titled in the name of the husband. *Id.* However, the court in another case that same year upheld a wife's equal interest in jointly titled real property although the husband claimed she did not pay an equal amount in its acquisition. Miller v. Miller, 298 So. 2d 704, 705 (Miss. 1974). In *Miller*, the court ruled that the wife assisted in the acquisition of the property by 16 years of labor and monetary contributions. *Id.* at 706.

[60] Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105, 105 (1979). By 1978, only seven states, including Mississippi, adhered to the common-law theory. *Id.* at 116. About 37 states divided marital property under the equitable distribution principle. *Id.* at 117. This increased use of the equitable distribution theory incident to divorce reflected the rise in the political power of women, an increased awareness of women's economic plight following divorce, and the theory's similarity to the partnership aspects of marriage. Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263, 265 (1983).

[61] *See* Bond v. Bond, 355 So. 2d 672, 673 (Miss. 1978) (chancellor's failure to divest title not error absent evidence of contribution by wife); *see also* Dillon v. Dillon, 498 So. 2d 328, 331 (Miss. 1986) (title claim by wife to stock, life insurance, and pension of husband denied because wife offered no evidence of her contribution); *cf.* Blue v. Blue, 445 So. 2d 1383, 1384 (Miss. 1984) (court denied wife property of former husband upon his death since prior agreement terminated joint tenancy); Parker v. Parker, 434 So. 2d 1361, 1362 (Miss. 1983) (court granted heirs of former husband interest in his marital residence where prior agreement terminated joint tenancy between deceased and his former wife).

[62] 380 So. 2d 1262 (Miss. 1980).

required one spouse to divest himself of title for the benefit of the other.[63] The court in *Wray* stated that the divorce decree incorporating the agreement did not operate to divest the husband of property,[64] but rather simply restated the terms of the agreement.[65] Furthermore, the court held that adherence to the terms of the property settlement was in accord with a well-settled rule that such agreements strictly bound the parties unless obtained by fraud.[66]

In 1982,[67] the court again addressed the issue of equitable relief for a wife who worked without pay in *Reeves v. Reeves*.[68] One authority credited the case for nearly ending the title theory in Mississippi.[69]

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[63] *Wray*, 380 So. 2d at 1264.

[64] *Id.* at 1263. In the agreement, the husband conveyed the marital residence and relinquished claims to furnishings, and the wife agreed to assume any outstanding liabilities against the home. *Id.*

[65] *Id.* The husband did not file an appeal after the chancellor entered the original divorce decree, but he raised objections to the property settlement when his wife requested that the decree be modified to increase child support payments. *Id.*

[66] *Id.*; *see also* V. GRIFFIN, MISSISSIPPI CHANCERY PRACTICE § 618, at 664 (2d ed. 1950) (consent decrees, like contracts, bind parties if agreements were duly authenticated in writing and recite that they were entered by consent of the parties).

[67] Freed & Foster, *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 289 (1983). By October, 1982, some 40 states distributed property using the equitable distribution theory. *Id.* at 326. Mississippi was among three states which continued to espouse the common-law theory. *Id.* at 325.

Pennsylvania became one of the equitable distribution states by a 1980 statute designed to bring more fairness to divorce laws and eliminate the old title theory. Perlberger, *Pennsylvania's Equitable Distribution: Progress or Confusion?*, 60 TEMP. L.Q. 293, 294 (1987). After adoption of the statute, however, the Pennsylvania Supreme Court faced problems of interpretation generally associated with equitable distribution, particularly the definition of marital property. *Id.* at 294. In interpreting the statute, which defines marital property as property acquired by either party during the marriage, the Pennsylvania court refused to classify professional degrees and licenses as marital property subject to distribution upon divorce. *Id.* However, the court developed an alimony system designed to reimburse a spouse for amounts contributed toward the career of the other spouse. *Id.* The Pennsylvania court reasoned that since the property sought was actually the value of future earnings, then the property would be acquired after the marriage ended and did not meet the statutory definition of marital property. Hodge v. Hodge, 520 A.2d 15, 18 (Pa. 1986). Similarly, a Delaware court, which adhered to the equitable distribution theory, ruled that worker's compensation benefits awarded during marriage were not marital property. Gloria B.S. v. Richard G.S., 458 A.2d 707, 708 (Del. Fam. Ct. 1982). Therefore, compensation for injury to his body was his separate property. *Id.* at 708. An Iowa court ruled, however, that the increased future earning capacity from a law degree was an asset subject to equitable distribution as marital property because the wife contributed financial support during the acquisition of the law degree. *In re* Marriage of Hortsman, 263 N.W.2d 885, 891 (Iowa 1978).

[68] 410 So. 2d 1300 (Miss. 1982).

[69] Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331,

The *Reeves* court suggested an equitable guideline for calculating the wife's contributions,[70] and its ruling displayed a changing approach toward awarding periodic alimony payments to divorcing wives.[71] In *Reeves*, the wife made monetary contributions toward the purchase of real estate, worked in the family business, and renovated a home without receiving any direct compensation.[72] The chancellor ordered the husband, a millionaire, to pay $6,000 in lump-sum alimony.[73] Finding the award shocking to the conscience, the supreme court remanded the case for determination of an award of a more equitable amount.[74] Furthermore, the court noted the principles adopted in *Jenkins*[75] regarding wives' equitable rights incident to divorce.[76] The *Reeves* court warned, however, that its decision to divide jointly-held certificates of deposit equally between the parties was not an adoption of the community property theory.[77]

After clarifying equitable principles in *Reeves*, the court in *Watts v. Watts*[78] upheld an order by a chancellor that required a husband to deed to his wife an undivided one-half interest in real property titled in his name.[79] The equitable claim by the wife was supported by her

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333 (1985).

[70] *Reeves*, 410 So. 2d at 1303. The court suggested awarding the wife either $100,000 in lump sum or 10% of the husband's net estate. *Id.*

[71] *Id.* The court reasoned that the unemployed wife should not receive periodic alimony payments because she had previously held well-paying jobs and she had not shown that she would be dependent upon the husband for future support. *Id.*

[72] *Id.* at 1301.

[73] *Id.* at 1303. The lump sum was awarded for the wife's contributions to the accumulation of the assets and not as a support award. *Id.*

[74] *Id.* at 1303.

[75] *Id.* The court endorsed the holding in Jenkins v. Jenkins, 278 So. 2d 446 (Miss. 1973), wherein a substantial lump sum had been awarded to a wife who had made substantial contributions to the joint accumulation of assets. *Id.*; *see supra* notes 48-52 and accompanying text.

[76] *Reeves*, 410 So. 2d at 1303. Applying the equitable distribution method in all marriages, however, can result in lengthier divorce proceedings and greater expense in hiring lawyers, accountants and experts. *See* Oldham, *supra* note 60, at 268 (discussion of view opposing equitable distribution for self-supporting, childless spouses). A consistent application of the equitable distribution theory would be justified if all marriages were lifetime partnerships. *Id.* at 273. However, due to the large number of childless, working, divorced women, there is no justification for an across-the-board application of the equitable distribution theory. *Id.*

[77] *Reeves*, 410 So. 2d at 1303. Since the husband did not offer evidence to the contrary, the court assumed that the couple intended to have equal interests in the certificates of deposit. *Id.*

[78] 466 So. 2d 889 (Miss. 1985).

[79] *Watts*, 466 So. 2d at 890. The wife had sold a house and other real estate when

assumption of liability under the mortgage and her contribution to the purchase of the property.[80] While conceding that the title theory was not inflexible,[81] the *Watts* court cautioned that its decision was only an exception to the general title rule that prohibited divestment of realty.[82] The supreme court specifically indicated that, in upholding the action of the chancellor, it did not sustain a total divestment of title in the husband but rather only recognized a need for an equitable share in the title for the wife[83] since she contributed to the purchase of the property.[84]

In the instant case,[85] the supreme court recognized that spouses

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she married the husband and then used the proceeds to contribute to the purchase of the 20 acres involved in the divorce dispute. *Id.*

[80] *Id.* at 891. The court noted that there were decisions which stated that a wife deserved equitable title by way of a resulting trust if she had contributed to the purchase of the property. *Id.*; *see, e.g.*, Moore v. Moore, 74 Miss. 59, 63, 19 So. 2d 953, 954 (1896)(resulting trust from contribution if purchase money).

[81] *Watts*, 466 So. 2d at 890. However, Justice Anderson wrote that the decision in *Watts* neither created new law nor overruled the common-law rule. *Id.*

[82] *Id.* Other exceptions, the court noted, arose where the parties agreed to divestiture and where the chancellor divided jointly accumulated property. *Id.* (citing Wray v. Langston, 380 So. 2d 1262 (Miss. 1980); Chrismond v. Chrismond, 211 Miss. 746, 752, 52 So. 2d 624, 628 (1951)).

[83] *Id.* at 890. After *Watts*, the Mississippi Supreme Court generally conducted equitable searches behind titles in the distribution of marital property. *See* Regan v. Regan, 507 So. 2d 54, 56 (Miss. 1987)(court denied wife interest in jointly titled certificate of deposit since monies were derived solely from personal injury award to husband); Pickens v. Pickens, 490 So. 2d 872, 873 (Miss. 1986)(joint effort in accumulation of real and personal property entitled unmarried woman to equitable distribution of property titled in the name of other party upon termination of relationship); Rudder v. Rudder, 467 So. 2d 675, 678 (Miss. 1985)(rehearing granted to determine ability of husband to support his wife after husband liquidated jointly accumulated marital assets titled in his name). *But see* Thompson v. Thompson, 527 So. 2d 617, 623 (Miss. 1988)(chancellor lacked authority to divide jointly titled marital property after chancellor denied wife's request for divorce but awarded her separate maintenance).

[84] *Watts*, 466 So. 2d at 890. As of 1987, 41 states had adopted equitable distribution in property division incident to divorce. Freed & Walker, *supra* note 10, at 452. In a case of first impression, the Georgia Supreme Court ruled that the appreciation in value of stock that occurred during the marriage was not subject to equitable distribution since the titled spouse acquired the stock prior to marriage and the untitled spouse made no contribution to the appreciation. Halpern v. Halpern, 352 S.E.2d 753, 754 (Ga. 1987). The Alaska Supreme Court, however, ruled that the unpaid leave of the husband convertible to cash was subject to equitable distribution upon divorce. Schober v. Schober, 692 P.2d 267, 268 (Alaska 1984). The court reasoned that the unused leave was a form of property and an economic resource that could be assigned value by the court; therefore, it was subject to distribution. *Id.*

[85] Jones v. Jones, 532 So. 2d 574 (Miss. 1988). The court noted that its decision stemmed from the principles of past rulings granting chancery courts broad authority to

could be awarded monetary compensation proportionate to their assistance in accumulating real property, and therefore there was no reason why a spouse should not under the same circumstances receive title to the real property.[86] Furthermore, previous decisions in which the court had approved interspousal title conveyances pursuant to settlement agreements allowed the court in the instant case to hold that an equitable conveyance pursuant to a chancellor's order was acceptable.[87] The court also held that because realty could be subjected to liens to secure the payment of lump-sum alimony awarded for contributions to the accumulation of property, and because the effect of these liens would be similar to an equitable title divestment that compensated a spouse who gave similar assistance, it was not improper to grant divestment.[88] In addition, chancery courts, being vested with the authority to allow a claim for an equitable interest in property by a putative spouse, are also vested with the authority to order a title transfer to jointly accumulated marital property where a legally married spouse contributed to its acquisition.[89] More specifically, the court reasoned that Mrs. Jones' contributions[90] in money and services to the acquisition of the couple's real property entitled her to an equitable share in that jointly accumulated real property and that the chancery court had acted within its authority by ordering that the equitable distribution be effected by transfer of title.[91]

In a strongly-worded concurring opinion,[92] Justice Prather argued that because Mrs. Jones also contributed as a homemaker[93] in the ac-

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equitably distribute marital property. *Id.* at 580.

[86] *Id.* at 580 (citing Reeves v. Reeves, 410 So. 2d 1300, 1303 (Miss. 1982); Clark v. Clark, 293 So. 2d 447, 449 (Miss. 1974)).

[87] *Jones*, 532 So. 2d at 580 (citing Watts v. Watts, 466 So. 2d 889, 891 (Miss. 1985); Wray v. Langston, 380 So. 2d 1262, 1264 (Miss. 1980)).

[88] *Jones*, 432 So. 2d at 580 (citing Buckalew v. Stewart, 229 So. 2d 560, 561 (Miss. 1969)). Upon default in the payment of lump-sum alimony property subjected to a lien and titled in one spouse can be sold, and the proceeds disbursed to the entitled spouse. *Clark*, 293 So. 2d at 450. Similarly, in *Jones*, the equitable property distribution served to take property away from the husband for the benefit of the wife. *Jones*, 532 So. 2d at 580.

[89] *Jones*, 532 So. 2d at 580 (citing Chrismond v. Chrismond, 211 Miss. 746, 759, 52 So. 2d 624, 630 (1951)).

[90] *Id.* at 581.

[91] *Id.*

[92] *Id.* Justice Robertson and Justice Zuccaro joined in the concurring opinion. *Id.*

[93] *Id.* Mrs. Jones worked as a homemaker for 24 years and reared two children. *Id.* The constitutional guarantee of equal protection would require similar consideration for the services of a husband who worked in the home while his wife worked. *Id.* at n.1; U.S. CONST. amend. XIV, § 1.

cumulation of real property, the court should have further erased limitations on real property title transfers by adopting an equitable distribution principle that recognized the services of a homemaker[94] as a material contribution justifying title divestment.[95] Justice Prather also argued that the court should have extended its ruling since no reasonable justification exists[96] for a court to hold that a homemaker has a right to the personal property of the titled spouse for her domestic services but not to real property in recognition of the same contributions.[97] Justice Prather finally urged that the lingering vestiges of the title theory should be completely eradicated since all of its viability has been eliminated by changing views and the passage of time.[98]

The Mississippi Supreme Court's decision in *Jones* represents the

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[94] Freed & Foster, *supra* note 47, at 277. Consideration of homemaker contributions was provided for in a Kentucky statute in the early 1970's. *Id.* Later, West Virginia, a former common-law title state in 1983, became an equitable distribution state after its supreme court of appeals held that a homemaker's nonmonetary contributions to the acquisition of marital property were to be considered in dividing marital property. LaRue v. LaRue, 304 S.E.2d 312, 321 (W.Va. 1983). In *LaRue*, the husband urged his wife to become a homemaker and mother during their 30-year marriage while he worked to support the family. *Id.* at 315. The court ruled that the non-monetary contributions of a homemaker contributed to the economic well-being of the family. *Id.* at 316, 320, 323; *see* Canakeris v. Canakeris, 382 So. 2d 1197, 1204 (Fla. 1980) (homemaker entitled to half interest in value of marital home by lump-sum alimony to homemaker services); Parrott v. Parrott, 292 S.E.2d 182, 184 (S.C. 1982) (wife who gave up career opportunities and made contributions as homemaker deserved special equity in the distribution of property titled to husband). Evaluating the homemaker's economic contribution is difficult, and the determinations are often inaccurate. Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupation*, 17 FAM. L.Q. 41, 43 (1983). Two commonly used methods are the replacement and the opportunity cost theories. *Id.* at 49. The replacement cost theory entails awarding an amount comparable to wages earned by employees in the job market who are doing work comparable to housework. *Id.* The opportunity cost method requires a determination of the "next best" occupation the wife forwent to become a homemaker followed by an application of the appropriate market value of the wife's forbearance. *Id.* at 52.

[95] *Jones*, 532 So. 2d at 583. The concurring justices found authorization for title divestiture by a chancellor in MISS. CODE ANN. § 93-5-23 (Supp. 1989), which allows for equitable consideration of the support given by a wife. *Id.*; *Jones*, 532 So. 2d at 583.

[96] *Jones*, 532 So. 2d at 583. Maintaining stable real estate titles that protect lienholders is one argument used to justify the title theory. *Id.* However, Justice Prather writes that this argument fails since no equitable distribution could ever alter lienholders' priorities. *Id.*

[97] *Id.* To illustrate, Justice Prather found it illogical to contend that a lesser remedy should be given to a wife whose husband has net assets of $1 million in real estate and a wife whose husband has net assets of $1 million in cash and in readily convertible securities. *Id.*

[98] *Id.* at 583-84 (citing Miller v. Miller 298 So. 2d 704, 707 (Miss. 1974)).

latest step in a continuous journey away from the common-law title theory prohibiting title divestment incident to divorce.[99] By recognizing a spouse's contributions to the joint accumulation of real property regardless of which spouse holds title, the decision brings Mississippi closer to the forefront in the equitable distribution of marital property.[100]

Prior to the court's decision, divorcing spouses, and particularly women, were unreasonably denied a fair distribution of the real property.[101] The journey toward fairness was delayed by previous overbroad interpretations of *McCraney*.[102] Narrowly construed, the *McCraney* decision prohibited the use of a divorce decree as a deed to convey property, but the court did not absolutely prohibit a title divestment.[103] In fact, the *McCraney* court in effect recognized title divestments through the attachment of liens on real property for non-payment of alimony.[104]

The *Jones* decision now allows chancery courts to recognize the contributions of one spouse in the accumulation of real property which were hidden behind title in the other spouse.[105] This more equitable method of distribution also provides an economic addition to the oft-times insufficient and shrinking availability of alimony and other support to non-titled spouses.[106] Access to real property will better insure that spouses, particularly those who have custody of small children, will reap the economic benefits of having a titled interest in property.[107]

While the decision in *Jones* is a step in the right direction, the court has, however, further ground to cover in light of its failure to recognize the homemaker's contribution to the joint accumulation of real property.[108] As Justice Prather noted in the concurring opinion, a homemaker's contribution is indeed an important factor that justifies title divestment upon divorce.[109] In future decisions, then, the court

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[99] *See supra* note 49 and accompanying text.

[100] *See supra* note 83.

[101] *See supra* note 34.

[102] *Id.*

[103] *See supra* note 20.

[104] *See supra* note 19.

[105] *See supra* note 36 and accompanying text; *see also* White v. White, 557 So. 2d 480, 485 (Miss. 1989) (citing *Jones* to demonstrate importance of considering both service and in kind contributions in determining award of lump-sum alimony).

[106] *See supra* note 51.

[107] *Id.*

[108] *See supra* note 93 and accompanying text.

[109] *See supra* note 95.

should further extend the principles of equity and eliminate all vestiges of the unfair and antiquated title theory.[110]

Betty Mallett

[110] *See supra* note 96.

Tort Liability — Governmental Immunity — Discretionary Function Exception to Federal Tort Claims Act Is Not Applicable When Regulatory Acts Are Mandated by Statute, Regulation, or Policy

Plaintiffs[1] filed suit under the Federal Tort Claims Act[2] in the Federal District Court for the Western District of Pennsylvania, seeking damages from the United States government[3] for licensing and approving a defective polio vaccine which paralyzed the infant plaintiff.[4]

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[1] Plaintiff Kevan Berkovitz ingested a dose of Orimune, an oral polio vaccine manufactured by Lederle Laboratories. Berkovitz v. United States, 108 S. Ct. 1954, 1957 (1988). The infant plaintiff, who was two months old at the time, contracted polio from the vaccine, which left him paralyzed and unable to breathe without artificial respiration. *Id.* His parents, acting as guardians, joined him in this action. *Id.*

[2] 28 U.S.C. §§ 1346, 2671-2680 (1982).

[3] *Berkovitz*, 108 S. Ct. at 1957. The action proceeded, in particular, against the Division of Biologic Standards and the Bureau of Biologics of the Food and Drug Administration for the negligent licensing and testing of the polio vaccine, Orimune. *Id.* at 1960. The plaintiffs based their claim on the Federal Tort Claims Act, which authorized suits against the United States for money damages. The Act provides:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1982).

[4] *Berkovitz*, 108 S. Ct. at 1957. Specifically, the plaintiffs brought two allegations of negligence: one against the Division of Biologic Standards (DBS), for the licensing of the polio vaccine, and another against the Bureau of Biologics for the release of the vaccine to the public. *Id.* at 1960. First, the plaintiffs urged that the Division of Biologic Standards licensed Lederle Laboratories to produce Orimune without receiving the appropriate data to determine whether the polio vaccine complied with regulatory standards. *Id.* at 1962. Under the "Regulation of Biological Products" statute, 42 U.S.C. § 262(d)(1) (Supp. 1989), the issuance of licenses was specifically permitted only "upon a showing" by the manufacturer that the vaccine complied with safety standards. *Berkovitz*, 108 S. Ct. at 1962. The plaintiffs' second allegation against the DBS was that the DBS licensed Orimune even though the vaccine did not comply with safety standards. *Id.* The vaccine strain allegedly did not meet the regulatory standards because (1) it was not "free of harmful effect upon administration in the recommended dosage to at least 100,000 people susceptible to poliomyelitis," 42 C.F.R. § 73.110(b)(2)(i) (Supp. 1964), and (2) it did not meet the neurovirulence requirement, the minimal capacity of the vaccine to have a harmful effect on the central nervous system, 42 C.F.R. § 73.110(b)(2)(ii), (b)(4),

The government argued that its licensing activities were discretionary functions and had been expressly exempted from any waiver of sovereign immunity under the Federal Tort Claims Act.[5] The district court rejected this contention and denied the government's motion to dismiss.[6] The United States Court of Appeals for the Third Circuit reversed.[7] On writ of certiorari,[8] the United States Supreme Court, *held*, reversed and remanded.[9] Where a statute, regulation, or policy controlled the regulatory activities of a federal employee or agency, those activities were not "discretionary functions" under the Federal Tort Claims Act,[10] and the government did not enjoy immunity. *Berkovitz v. United States*, 108 S. Ct. 1954 (1988).

During the early history of sovereign immunity in the United

.114(b)(1) (Supp. 1964). *Berkovitz*, 108 S. Ct. at 1962 n.9. Finally, the plaintiffs argued that the Bureau of Biologics of the Food and Drug Administration had the duty to approve the release of every batch of the vaccine to ensure compliance. *Id.* at 1963. The Court found that regulatory standards, 21 C.F.R. § 610.1 (1978), imposed a duty on the manufacturer to test every batch for compliance, but that regulations empowering the Bureau of Biologics to examine vaccine and prevent distribution, 21 C.F.R. § 610.1 (1978), imposed no corresponding duty. *Berkovitz*, 108 S. Ct. at 1963. The plaintiffs, however, alleged that the Bureau of Biologics had actually tested the batch and failed to perceive the defect. *Id.* at 1964. These claims were accepted as true, for the purpose of reviewing the government's motion to dismiss. *Id.* at 1963-64.

[5] *Berkovitz*, 108 S. Ct. at 1957. The government based its motion to dismiss on the "discretionary functions" exception of the Federal Tort Claims Act. *Id.* (citing 28 U.S.C. § 2680(a) (1982)). That statute provides, in pertinent part, that there is no liability in tort for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* The government argued that the approval and licensing of the vaccine were discretionary functions of the agencies involved and that the government was thus not liable in tort. *Id.*

[6] Berkovitz v. United States, No. 84-2893 (W.D. Pa. Apr. 30, 1986) (WESTLAW, Allfeds library), *rev'd*, 822 F.2d 1322 (3d Cir. 1987), *rev'd*, 108 S. Ct. 1954 (1988).

[7] Berkovitz v. United States, 822 F.2d 1322, 1332 (3d Cir. 1987), *rev'd*, 108 S. Ct. 1954 (1988). Hearing the arguments for dismissal on interlocutory appeal, the Court of Appeals for the Third Circuit held that some regulatory activities were discretionary within the meaning of the statute, and some were not. *Id.* at 1327-28. Federal employees, furthermore, did not have the discretionary power to contravene federal statutes. *Id.* at 1325. The court concluded, however, that the government had no duty to ensure compliance in the production of every batch of vaccine. *Id.* at 1330. Since the government exercised judgment in deciding which batches to test and which standards to apply, those activities fell within the sphere of a discretionary function. *Id.* at 1332. Sovereign immunity therefore applied. *Id.*

[8] Berkovitz v. United States, 108 S. Ct. 1954 (1988).

[9] *Id.* at 1965.

[10] 28 U.S.C. § 2680(a) (1982).

States, a plaintiff seeking relief in tort from the federal government could proceed only on some theory of consent by the government or through the introduction of a private bill in Congress.[11] The United States allowed this system of relief to continue until 1946, when Congress expanded the potential for suits against the government with the Federal Tort Claims Act.[12] The Act drastically curtailed the scope of sovereign immunity in the United States but still provided immunity for governmental "discretionary" functions.[13]

The seminal case construing the Federal Tort Claims Act and, in particular, the discretionary function exception, was *Dalehite v.*

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[11] *See* Note, *Sovereign Immunity and the Discretionary Function Exception of the Alaska Tort Claims Act*, 2 ALASKA L. REV. 99, 101 (1985) (authored by Marcia S. Orgill & Bellanne M. Toren). The basis for sovereign immunity, some believed, arose from the frequently quoted maxim, "The King can do no wrong." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Lewis ed. 1897). Actually, the concept found its roots in the belief that, absent consent, the state was immune from suit. *See* Feres v. United States, 340 U.S. 135, 139 (1950) (suit allowed against state only when authorized by legislature); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378-80 (1821) (tort actions against United States barred unless government consented to suit). In the six years before passage of the Federal Tort Claims Act, Congress considered nearly 15,000 private bills. Note, *supra*, at 101 n.17. Most commentators agreed that the private bill system of obtaining relief from the government was cumbersome and hindered sincere efforts to legislate in areas of national concern. Harris & Schnepper, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 164-65 (1976).

In an early attempt to afford some relief to private individuals, Congress had created the United States Court of Claims in 1855. Dalehite v. United States, 346 U.S. 15, 25 n.10 (1953). This court had the authority to hear claims against the government which were based on contracts, federal regulations, and federal law. *Id.* In 1887, the jurisdiction of the Court of Claims widened to include all actions for damages except those arising in tort. *Id.* The United States District Courts simultaneously obtained concurrent jurisdiction for all claims not based on tort up to $10,000. *Id.* Sovereign immunity was diminished further in 1910, 1920, and 1925, when the government consented to suit in district courts in cases involving patent infringement, admiralty, and maritime tort respectively. *Id.*

[12] *See* Note, *supra* note 11, at 102 (citing 28 U.S.C. § 2671-80 (1982)).

[13] 28 U.S.C. § 2680(a) (1982). The legislative history of the discretionary function exception revealed a Congressional intention to disallow suits against the government which inhibited the formulation of political, economic, and social policy. Plave, United States v. Varig Airlines: *The Supreme Court Narrows the Scope of Government Liability Under the Federal Tort Claims Act*, 51 J. AIR L. & COM. 197, 203 (1985). The House Report on the Federal Tort Claims Act provided that "[i]t is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort." H.R. REP. No. 2245, 77th Cong., 2d Sess. 6 (1942). The purpose of the exception, as construed by many analysts, was to limit the courts to deciding issues of fact, rather than political or social policy. Plave, *supra*, at 203.

United States.[14] The dispute in *Dalehite* arose over a catastrophic explosion of fertilizer grade ammonium nitrate (FGAN) which was to be shipped to war-torn Europe and Asia.[15] In particular, the plaintiffs alleged that the government had negligently advocated the fertilizer export program as a whole, carelessly supervised the manufacturing process, and improperly policed the loading of the fertilizer.[16] Examining the legislative history and the text of the exception, the Court found that two types of activity did not lead to liability.[17] The first protected area was the act of a federal employee exercising due care in carrying out a statutory or regulatory mandate, whether or not that mandate was valid.[18] The *Dalehite* Court stated that the discretionary acts of employees were also immune, even if the employee abused that discretion.[19] To use discretion was to "act according to one's judgment of the best course."[20] Protected discretion not only existed at the highest levels of governmental decision-making, but also spread down to the lower echelons.[21] As the Court noted, the discretionary function excep-

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[14] 346 U.S. 15 (1953). In the years prior to *Dalehite*, the government had gradually loosened the grip of sovereign immunity by abrogating it piecemeal but had failed to address the problem in toto. *Dalehite*, 346 U.S. at 25-26 n.10; *see supra* note 11.

[15] *Dalehite*, 346 U.S. at 19. FGAN's major component was ammonium nitrate, a highly combustible material used in explosives. *Id.* at 21. The government shipped the FGAN to Texas City, Texas, and loaded it on two ships bound for France. *Id.* at 22. Army personnel were responsible for meeting specifications and satisfying production schedules. *Id.* at 20-21. The managing corporations were responsible for everything else and supplied the personnel and production experience required. *Id.* at 21. The ships exploded from unknown causes, and the result was a tremendous loss of life and property. *Id.* at 23.

[16] *Id.* at 23-24.

[17] *Id.* at 33.

[18] *Id.* By protecting the acts of employees carrying out their regulatory or statutory duties, Congress wished to bar tests of the validity of statutes and administrative regulations through tort causes of action. *Id.*

[19] *Id.* The language of the discretionary function itself explicitly protected the discretionary acts of officials "whether or not the discretion involved be abused." *Id.* (quoting 28 U.S.C. § 2680(a) (1982)). The exercise of judgment, either good or bad, was exempt from liability, since a challenge to that judgment in court amounted to considerations of policy in a forum ill equipped to determine such issues. *Id.*

[20] *Id.* at 34. In arriving at this definition of discretion, the Court cited several landmark cases describing discretion as a policy judgment or choice. *Id.* (citing Louisiana v. McAdoo, 234 U.S. 627, 633 (1914) (stating that courts will refuse to substitute their judgment or discretion for that of official entrusted by law with its execution); Spalding v. Vilas, 161 U.S. 483, 498 (1896) (holding that personal motives cannot be imputed with duly authorized official conduct); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803) (defining discretion as exercise of judgment)).

[21] *Id.* at 33.

tion included "more than the initiation of programs and activities";[22] it also included decisions of executives in planning, establishing specifications, or scheduling operations. The Court stated, "Where there is room for policy judgment and decision, there is discretion."[23] The cabinet-level decision to initiate the fertilizer program, under this analysis, fell within the exception, since that decision involved discretion of the most basic kind.[24] The decisions regarding the coating, bagging, and labeling of the FGAN at the manufacturing stage, however, proved more troublesome.[25] Nevertheless, the Court found that since these decisions involved the feasibility of the whole program, and since the agencies in question made those decisions at a "planning rather than operational level," they did not result in liability.[26] Finally, the *Dalehite* Court held that it was within the discretion of the Coast Guard and other agencies to decide whether to institute regulatory standards for the storage of such substances.[27] Thus the discretionary

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[22] *Id.* at 35-36.

[23] *Id.* The exception protected not only the initial discretionary decision, but also all decisions and acts made in carrying out that initial decision. *Id.* If it were otherwise, the Court reasoned, the exception was useless, since an attack on the acts of subordinates carrying out the decision of the superior rendered the decisions of the superior null and void. *Id.*

[24] *Id.* at 37. Here the Court noted that neither party contested the view that the cabinet-level decision to initiate the program was discretionary. *Id.*

[25] *Id.* at 40-42. Plaintiffs cited three areas in which the government was negligent in handling the FGAN. *Id.* First, the plaintiffs alleged that coating the FGAN with a flammable substance called PRP was careless. *Id.* at 40. The Court found, however, that the water-repellent PRP was necessary to prevent the fertilizer from caking. *Id.* Second, the plaintiffs questioned the high bagging temperature, but the Court held that lowering bagging temperatures involved higher production costs and/or reduced production. *Id.* at 41. Normally, the bagging of FGAN took place at temperatures around 200 degrees, and, although it was possible to cool the substance, manufacturers recognized that cooling added unneeded expense. *Id.* at 40-41. The plaintiffs further argued that the fertilizer labeling was improper. *Id.* Specifically, the plaintiffs wanted the bags labeled in terms showing their explosive tendencies. *Id.* at 42. ICC regulations, however, did not require labeling FGAN as anything other than fertilizer. *Id.* Even if the cabinet-level decision was discretionary, the plaintiffs argued, the coating, bagging, and labeling decisions were not of the same magnitude and were not discretionary. *Id.*

[26] *Id.* at 42. The Court analyzed each contention the plaintiffs made and concluded that each decision was discretionary and involved considerable policy judgment. *Id.* Each decision regarding the coating, bagging, and labeling involved the feasibility of the entire program and was thus not actionable. *Id.*

[27] *Id.* at 43. Decisions as to whether to regulate and what type of regulation were classically within the exception. *Id.* They were inherently discretionary, since, at the core, those decisions were legislative in nature. *Id.* The Court recognized the long-standing distinction between an agency's decision to create a rule and the agency's actions in carrying out that rule. *Id.* The former was discretionary, while the latter generally was

function exception applied, and the Court dismissed the suit.[28]

Two tests emerged from the *Dalehite* decision: the "planning/operational level" test[29] and the "quality of the decision" test.[30] Under the first test, the Court examined the governmental level of the decision-maker, while under the second, the decision itself fell under scrutiny.[31] The majority in *Dalehite*, critics argued, implicitly assumed that those decisions made at a high, or "planning," level were discretionary, while those made at a low level were operational and nondiscretionary.[32] The admission of the Court that it failed to define discretion adequately[33] and that the only applicability of the ruling was to the particular facts of that case only compounded the problem.[34]

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not. *Id.*

[28] *Id.* at 43-44. Justice Jackson, in his fiery dissent, accepted the planning/operational distinction, but argued that it applied only to the decision to implement the policy, and not to the negligent conduct of those carrying it out. *Id.* at 58 (Jackson, J., joined by Black, J., and Frankfurter, J., dissenting). Many of the acts complained of in *Dalehite*, he argued, did not involve questions of policy, but rather the "housekeeping side" of policy implementation. *Id.* at 60; *see also* Note, United States v. Varig: *Can the King Only Do Little Wrongs?*, 22 CAL. W.L. REV. 175, 176-80 (1985) (authored by Thomas H. Rice) (analyzing evolution of discretionary function exception and planning/operational distinction); Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1312 (1987) (authored by D. Scott Barash) (arguing that Court went too far in construing coating, bagging, and labeling decisions as discretionary acts). Following the Supreme Court decision in *Dalehite*, the government created a special claims agency to provide relief for personal and property damage incurred in the explosion. Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 MIL. L. REV. 1, 8-9 (1977).

[29] *Dalehite*, 346 U.S. at 42. As early as 1886, courts recognized the distinction between planning and operation in applying the doctrine of sovereign immunity. *See* Johnston v. District of Columbia, 118 U.S. 19, 21-22 (1886) (adoption of drainage system found to be planning level decision, but District of Columbia liable for negligent construction and operation).

[30] *Dalehite*, 346 U.S. at 35-36. *See generally* Case Comment, *Discretionary Function Exception to the F.T.C.A.: Separation of Powers Concerns in Parole Release Decisions* Payton v. United States, 15 GA. L. REV. 1125, 1130-31 (1981) (discussing *Dalehite* and subsequent use of its two tests of discretion).

[31] *See Dalehite*, 346 U.S. at 40-41.

[32] Comment, *The Discretionary Function Exception: Is It a Bar to Federal Jurisdiction?*, 1983 UTAH L. REV. 117, 122. As some commentators suggested, this approach ignored the non-discretionary acts initiated at the highest levels and the discretionary acts done at the lowest. *Id.* The Court transformed the distinction between the discretionary and non-discretionary act into a distinction between the high and low level of the status of the decision-maker. *Id.*

[33] *Dalehite*, 346 U.S. at 35. "It is unnecessary to define, apart from this case, precisely where discretion ends." *Id.*

[34] Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law Negligence*, 60 ST.

Two years later, in *Indian Towing, Co. v. United States*,[35] the Court again attempted to define, more precisely, the limits of the discretionary function exception. In that case, a barge towed by Indian Towing ran aground when a lighthouse, owned and maintained by the government, failed to illuminate dangerous shallows.[36] The subsequent complaint charged as negligent the Coast Guard's failure to adopt a more effective inspection policy, to discover the defect when the Coast Guard actually inspected the lighthouse,[37] and to repair the defect or give adequate warning of the defect's existence.[38] A significant difference between *Indian Towing* and *Dalehite* was that, in *Indian Towing*, the government conceded that the inspection of the lighthouse was an "operational level" activity and that liability existed for the negligent performance of some operational level functions.[39] According to this line of reasoning, the case should turn on the interpretation of section 2674 of the Federal Tort Claims Act, which provided that the government was liable only if private individuals were accountable under "like circumstances."[40] The government argued that private individuals never performed inspections such as these and that these activities were therefore "uniquely governmental functions."[41] Since private persons did not engage in these functions, there would be no liability.[42] The Court rejected this analysis, however, finding that private individuals could be found liable under similar circumstances.[43] Here the Court applied the "good Samaritan" doctrine, which held that those who undertook to warn the public of a danger were liable if they did so

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JOHN'S L. REV. 221, 275 (1986).

[35] 350 U.S. 61 (1955).

[36] *Indian Towing*, 350 U.S. at 62.

[37] *Id.* The complaint alleged that the Coast Guard actually inspected the lighthouse in question and did not discover the defect in the light. *Id.* The Chief Petty Officer did not check the electrical connections from the battery to the light because they were "out in the weather." *Id.* The Coast Guard then failed to re-inspect the lighthouse for several months. *Id.*

[38] *Id.*

[39] *Id.* at 64. "The Government concedes that the exception of § 2680 relieving from liability for negligent 'exercise of judgment'. . . is not involved here, and it does not deny that the Federal Tort Claims Act does provide for liability in some situations on the 'operational level' of its activity." *Id.*

[40] 28 U.S.C. § 2674 (1982). This section provided, in pertinent part, that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." *Id.*

[41] *Indian Towing*, 350 U.S. at 64-65.

[42] *Id.* at 64.

[43] *Id.* at 66.

in a negligent or careless manner.[44] Although the Court did not rule directly on the issue of negligence, it noted that if the Coast Guard had acted negligently, the government could be liable under such a theory.[45] The Court warned the government that it should not "import immunity back into a statute designed to limit it."[46]

A companion case, often cited in connection with *Indian Towing*, was *Rayonier, Inc. v. United States*.[47] The dispute in *Rayonier* resulted from a fire which began on land owned by the United States.[48] In an action brought against the United States under the Federal Tort Claims Act, complainants alleged as negligent the government's allowing an accumulation of flammable materials on its land, its failure to prevent a railroad from starting the fire, and its failure to contain and extinguish the fire while it was still possible to do so.[49] Applying the same rationale as it did in *Indian Towing*, the Court held that the government was liable if private individuals would be accountable under similar circumstances.[50] Once again, the Court rejected the assertion that the government enjoyed absolute immunity when performing "uniquely governmental functions."[51] Instead, the Court declared, the purpose of the Federal Tort Claims Act was to expose the government to "novel and unprecedented" liability which was previously barred by traditional governmental immunity.[52] The Court vacated the prior judgments and instructed the trial court to determine whether liability would be imposed under the laws of the State of Washing-

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[44] *Id.* at 64-65.

[45] *Id.* at 64-65, 69. *See generally* Note, *supra* note 28, at 179-80 (investigation of "uniquely governmental functions" and applicability of "good Samaritan" doctrine); Comment, *supra* note 32, at 122-23 (analyzing impact of "good Samaritan" doctrine upon discretionary function exception).

[46] *Indian Towing*, 350 U.S. at 69.

[47] 352 U.S. 315 (1957).

[48] *Rayonier*, 352 U.S. at 315.

[49] *Id.* at 317.

[50] *Id.* at 319.

[51] *Id.* The government argued that fire-fighting was traditionally a "uniquely governmental function." *Id.* at 318-19. Since the Federal Tort Claims Act specifically provided that the federal government was liable only when private citizens were, the government believed that there was no liability. *Id.* The Court rejected this contention by holding that the whole purpose of the Act was to expose the government to liability, even for its "uniquely governmental functions." *Id.*

[52] *Id.* at 318-19. The Court declared that Congress intended to spread the cost of certain losses over the entire society. *Id.* at 320. The Court reasoned that since everyone benefited from governmental services, everyone should pay for the injuries resulting from those services. *Id.* Thus the increased liability for government activities was palatable only because the absence of relief produced unjust hardships for injured individuals. *Id.*

ton.[53] As one scholar noted, the Court in *Indian Towing* and *Rayonier* did not define discretion with precision but "simply brought lower courts into line with what it determined discretion was not."[54]

The *Dalehite* decision, supported by *Indian Towing* and *Rayonier*, provided only a foundation for defining the discretionary function. Taken alone, the planning/operational level test proved an ineffective and unworkable standard.[55] Gradually, however, some lower courts established basic ground rules to match this unwieldy standard with a variety of fact situations. One of these basic concepts dealt with the administrative agency's role as a creator of rules and regulations. The promulgation of rules and regulations by governmental agencies was consistently held to be within the discretionary function exception.[56] Thus decisions about whether to draft a given rule and the nature of that rule were discretionary acts within the meaning of the Federal Tort Claims Act.[57] Similarly, there was a broad consensus regarding the application of rules, regulations, and statutes by federal agencies.

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[53] *Id.* at 321.

[54] Kratzke, *supra* note 34, at 280.

[55] Note, Allen v. United States: *Discretion Defined Downwind*, 1985 UTAH L. REV. 435, 445. Many scholars have noted that the planning/operational distinction, advocated in *Dalehite* and followed by the Court in *Indian Towing* and *Rayonier*, was adequate as a theoretical model, but broke down when applied to actual fact situations. *Id.* For instance, in *Dalehite*, the Court found that the Coast Guard was not liable for negligent fire-fighting since government bodies were never liable for those activities. *Dalehite*, 346 U.S. at 43. As the Court stated, "The Act did not create new causes of action where none existed before." *Id.* In *Rayonier*, however, the Court readily considered the possibility that the United States Forest Service was liable for its fire-fighting activities. *Rayonier*, 352 U.S. at 321. While the *Rayonier* Court did not rule that the government was liable for its fire-fighting functions, it pondered that possibility in direct contradiction to the ruling in *Dalehite*. *Id.* Furthermore, commentators have argued, the planning/operational level test, as utilized in *Dalehite*, delineated no clear boundaries, between those acts considered discretionary and those that were not. Note, *supra*, at 445. The Court in *Dalehite* found immunity from the cabinet-level decision to initiate the fertilizer export program all the way down to the decisions regarding the coating, bagging, and labelling of the FGAN. *Dalehite*, 346 U.S. at 40-42.

[56] *See* Petty v. United States, 679 F.2d 719, 724 (8th Cir. 1982) (decision to establish national immunization program); Garbarino v. United States, 666 F.2d 1061, 1065-66 (6th Cir. 1981) (decisions on standards for air safety); Martin v. United States, 546 F.2d 1355, 1360 (9th Cir. 1976) (park-management decisions to reduce human-bear contact); *see also* Callas' Estate v. United States, 682 F.2d 613, 622 (7th Cir. 1982) (failure to provide safety information for waters surrounding federal lock and dam was protected, but once warnings were given, adequate warnings were obligatory).

[57] *See* Miller v. United States, 522 F.2d 386, 387 (6th Cir. 1975) (government's failure to make air safety regulations stricter); Smith v. United States, 330 F. Supp. 867, 868-69 (E.D. Mich. 1971) (decision to create rules preventing negligent discharge of firearms by National Guardsmen).

Generally, proper application of the regulation or the absence of a regulation resulted in immunity,[58] while improper application ended in liability.[59]

Along with this formulation came a more precise clarification of the boundaries between planning level decisions and those made at the operational level.[60] Illustrative of this trend was *Griffin v. United*

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[58] *See* Fortney v. United States, 659 F. Supp. 127, 129 (W.D. Va. 1987) (failure to ensure that munitions factory operator used safety precautions), *aff'd*, 841 F.2d 1122 (4th Cir. 1988); All Maine Asbestos Litigation, 655 F. Supp. 1169, 1175-76 (D. Me. 1987) (failure to require precautions against asbestosis); Cunningham v. United States, 625 F. Supp. 1016, 1020 (D. Mont. 1985) (federal inspection reviewing compliance with work place safety regulations), *aff'd*, 786 F.2d 1445 (9th Cir. 1986); Colorado Ins. Group v. United States, 216 F. Supp. 787, 794 (D. Colo. 1963) (SEC agents' actions harming plaintiffs' business); *see also* Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 195 (D. Neb. 1980) (discretionary function exception applies to development of rules and regulations, not to implementation).

[59] *See* Weiss v. Lehman, 676 F.2d 1320, 1322 (9th Cir. 1982) (U.S. Forest Service employee's destruction of personal property); Peterson v. United States, 673 F.2d 237, 240 (8th Cir. 1982) (negligence of B-52 bombing crew while carrying out training mission in domestic airspace); Hitchcock v. United States, 665 F.2d 354, 363 (D.C. Cir. 1981) (government failure to warn diplomat's wife of possible risks from rabies immunization); *see also* Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975) (FBI officer's actions during hijacking were not discretionary since they contravened established policy); Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62, 77 (D.C. Cir.) (discretion exercised when government decided to operate control tower, but discretion did not exist to operate tower negligently and in contradiction to regulations), *aff'd per curiam*, 350 U.S. 907 (1955); Hoffman v. United States, 398 F. Supp. 530, 539 (E.D. Mich. 1975) (FAA's failure to enforce its regulation regarding minimum insurance coverage for air carriers not discretionary function).

[60] *See* Swanson v. United States, 229 F. Supp. 217, 220 (N.D. Cal. 1964). That court characterized the planning/operational level distinction as follows:

> The planning level notion refers to decisions involving questions of policy that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy.
>
> The operations level decision, on the other hand, involves decisions relating to the normal day-by-day operations of the government. Decisions made at this level may involve the exercise of discretion but not the evaluation of policy factors.

Id. The United States Court of Appeals for the Second Circuit also established a more precise approach to this problem. Hendrey v. United States, 418 F.2d 774, 782-83 (2d Cir. 1969). In *Hendrey*, the court weighed two factors in the application of the planning/operational distinction. Those factors were, first, whether the decision required a balancing of interests or application of a preexisting standard and, second, whether the decision involved general principles or merely the matching of a standard to the facts. *Id.* If the decision called for a balancing of interests and required an examination of general principles, the activity was immune. *Id.* However, if a clear-cut standard was in place and the agency merely applied the standard to the facts, then there was no discretion and liability existed. *Id.*

States, a decision by the United States Court of Appeals for the Third Circuit.[61] The facts of the case were almost identical to those of the instant case, in that the Division of Biologic Standards tested and approved a defective lot of polio vaccine which caused the plaintiff to contract polio.[62] The court rejected the government's argument that the discretionary function exception covered all regulatory acts.[63] Instead, the court held that when regulatory decisions failed to involve policy judgment affecting the public interest, the agency was liable in tort.[64] The Division of Biologic Standards exercised no policy judgment, since the agency's enabling statute limited it to the execution of the policy judgments of the Surgeon General.[65] The court reasoned that, even if it were conceded that the approval of the vaccine fell within the discretionary function exception, the federal agency still went beyond its powers by relying on "biological variation, a standard

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[61] 500 F.2d 1059 (3d Cir. 1974).

[62] *Griffin*, 500 F.2d at 1062. The lot in question exceeded the regulatory limits established for neurovirulence, the effect of the strain on the nervous system. *Id.* at 1067. The inspectors tested neurovirulence by measuring the effect of the vaccine on the central nervous systems of test monkeys. *Id.* at 1066. The Division of Biologic Standards based their approval on a phenomenon called "biological variation," which is premised on the fact that different organisms respond differently to the same stimuli. *Id.* at 1067. Thus, they reasoned, the neurovirulence reports were inaccurate because of the biological variation among the monkeys reacting to the test strain. *Id.* The regulations required that approval deal solely with the test strain and the reference strain. *Id.* at 1068. No provision in the statute or regulation authorized the Division of Biologic Standards to base its certification on biological variation. *Id.*

[63] *Id.* at 1063. This argument was a variation of the government's "uniquely governmental function" averments in *Indian Towing* and *Rayonier*. *See supra* notes 41, 50 and accompanying text.

[64] *Griffin*, 500 F.2d at 1064. The Court of Appeals for the Third Circuit relied on the key phrase from *Dalehite* that "[w]here there is room for policy judgment there is discretion." *Id.* (quoting Dalehite v. United States, 346 U.S. 15, 36 (1953)). There was no doubt that the inspectors exercised some type of judgment, but the court found that the judgment was professional and not guided by considerations of policy. *Id.* at 1066. The dissenters vehemently disagreed with this analysis, arguing instead that the disputed procedures involved considerable policy and planning discretion. *Id.* at 1075 (Van Husen, J., dissenting). For instance, dissenting Judge Van Husen found considerable discretion in deciding how much weight to give each of the factors. *Id.* Furthermore, the agency exhibited discretion in determining how much importance to give the results from each reference strain, since they constantly varied. *Id.* at 1976. Finally, the dissent argued that the technical or professional judgment exercised in *Griffin* was no different from the coating, bagging and labelling judgments made in *Dalehite*. *Id.* at 1076-77.

[65] *Id.* at 1076-77. The Division of Biologic Standards possessed discretionary authority in neither its statutory mandate nor its regulatory directives. *Id.* Since no discretion was given, the agency had no choice but to follow the guidelines set out by the Surgeon General. *Id.*

not provided for in regulations."[66] Thus the court held the Division of Biologic Standards liable for the negligent approval of the polio vaccine.[67] The court further warned that "the Government may be liable where its employees, in carrying out their duties, fail to conform to preexisting statutory and regulatory requirements."[68]

The United States Supreme Court's decision in *United States v.*

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[66] *Id.* at 1068. The twofold holding of the court, in essence, trapped the government. In the first instance, the Court of Appeals for the Third Circuit found that the approval of polio vaccines required no discretion or policy judgment on the agency's part. *Id.* at 1066. In the second instance, even if discretion existed in such an approval, there was no authorization for the agency to base its decision on the "biological variation" standard. *Id.* at 1068. The agency, then, clearly exceeded the power given to it by statute and regulation. *Id.*

[67] *Id.* at 1069. The *Griffin* decision signalled a fine tuning of two important developments in the application of the discretionary function exception. First, courts began to realize that the nature of the decision, rather than the level of the decision, was paramount. *See* Allen v. United States, 527 F. Supp. 476, 486 (D. Utah 1981) (maintenance and operation of nuclear test site not discretionary function), *rev'd*, 816 F.2d 1917 (10th Cir. 1987). The United States District Court of Utah rejected, at least one analyst argued, the implicit suggestion in *Dalehite* and *Indian Towing* that the level of decision-making was the dominant factor in finding discretion. Comment, *supra* note 32, at 124-25. Instead, courts looked at the nature of the decision made. *Id.* The court in *Allen* also advocated what became known as the "policy balancing" test. *Id.* The factors considered were the separation of powers violations, the nature of the injury and the extent of reliance on the governmental activity, and the balancing of governmental and private interests. *Id.*; *see also* Preston v. United States, 696 F.2d 528, 542 (7th Cir. 1982) (test applied was balancing of government interest in policy and private interest in allowing recovery); Madison v. United States, 679 F.2d 736, 739 (8th Cir. 1982) (policy balancing test advocated); Payton v. United States, 636 F.2d 132, 144 (5th Cir. 1981) (three-part test applied: plaintiff's interest in having loss spread over society, government's interest in having decision immunized, and capacity of courts to decide issue), *rev'd on other grounds*, 679 F.2d 475 (5th Cir. 1982); Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978) (balancing policies behind discretionary function exception and government activity in dispute). Second, the *Griffin* decision embodied the belief that discretion existed only where there was leeway for policy decision-making and did not exist where regulations or statues controlled an agency's actions. *See* Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 876-77 (10th Cir. 1984) (if mandatory guidelines for terminal control area design had been present, there would have been no discretionary function); Gross v. United States, 676 F.2d 295, 302 (8th Cir. 1982) (denial of farmer's eligibility for federal program was not discretionary function where eligibility was defined by preexisting objective standards); Caban v. United States, 671 F.2d 1230, 1232 (2d Cir. 1982) (decision to detain immigrant was not discretionary since right to enter country was based on objective verifiable standards).

[68] *Griffin*, 500 F.2d at 1069. The court echoed the general trend by finding an agency responsible for the improper application of rules, regulations, and statutes. *Id.* Had the Division of Biologic Standards followed its directives, there was the distinct possibility that liability would not have been found. *See supra* notes 55, 56 and accompanying text.

S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)[69] both crystallized and blurred the rulings of the lower courts. That case involved the consolidation of two companion cases from the United States Court of Appeals for the Ninth Circuit, *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. United States*,[70] and *United Scottish Insurance v. United States*.[71] The dispute in the former arose when a fire began in the towel disposal areas located in one of the lavatories of a Boeing 707.[72] The Varig Airlines pilot landed the aircraft safely, but most of the passengers died from the inhalation of toxic fumes.[73] The plaintiffs alleged that the towel disposal system did not meet the Fire Safety Regulations of the Federal Aviation Administration (FAA) and that the FAA was thus negligent in certifying the aircraft.[74] *United Scottish* involved the certification of a DeHavilland Dove aircraft which crashed as a result of a fire in the cabin heater and fuel line.[75] As in the companion case, the plaintiffs alleged that the FAA negligently issued a supplemental type certificate, disregarding the cabin heater's violation of airworthiness standards.[76] In ruling on the consolidated appeal, the United States Supreme Court found that the FAA did not inspect the towel disposal area in the Boeing or the cabin heater in the DeHavilland Dove.[77] The government raised the

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[69] 467 U.S. 797 (1984).

[70] 692 F.2d 1205 (9th Cir. 1982).

[71] 692 F.2d 1209 (9th Cir. 1982).

[72] *Varig Airlines*, 467 U.S. at 799-800.

[73] *Id.* at 800.

[74] *Id.* at 814. FAA regulations required the issuance of a type certificate for every new aircraft. *Id.* at 800 & n.1. For certification, the regulations required the manufacturer to submit the proper plans and test data to show that the aircraft complied with safety regulations. *Id.* The FAA made inspections of aircraft as necessary, to determine whether the aircraft met the regulatory standards. *Id.* at 817.

[75] *Id.* at 802-03.

[76] *Id.* at 814. The cabin heater at issue was not a part on the original aircraft manufactured in 1951. *Id.* at 802. In 1965 Air Wisconsin, the prior owner of the aircraft, had contracted with Aerodyne Engineering Corp. to install the cabin heater. *Id.* In order to build the cabin heater, Aerodyne applied for, and received, a supplemental type certificate, a requirement before adding a major component. *Id.* The supplemental type certificate was almost identical to the type certificate, in that the manufacturer had to show that the new component satisfied all safety and airworthiness regulations. *Id.* at 819. The burden of showing compliance fell on the manufacturer of the part. *Id.* at 816. As with the type certificate, the FAA had the authority to make the inspections it deemed necessary in determining whether the component met the regulatory standards. *Id.* at 816-17.

[77] *Id.* at 814-15. *But see* Note, *supra* note 28, at 193 (Supreme Court had evidence that inspection on DeHavilland Dove's cabin heater occurred and that FAA did not discover defect); Comment, *supra* note 28, at 1318 (Supreme Court wrongly ignored possibility that there was negligent inspection when evidence to that effect was present).

discretionary function exception as a jurisdictional defense.[78] In analyzing the discretionary function exception,[79] the Court introduced two crucial factors which were critical in deciding when to apply the exception. The "nature of the conduct, rather than the status of the actor," the Court held, was the determinative factor in ascertaining which decisions were exempt from judicial scrutiny.[80] Second, the Court found that whatever else Congress intended the exception to cover, it clearly encompassed the discretionary acts of the government "in its role as a regulator of the conduct of private individuals."[81] The task of the courts was to discover, first, whether Congress intended the conduct at issue to remain immune[82] and, second, whether the courts could redress the wrong without "second-guessing" legislative and executive decisions affecting public policy.[83] The Secretary of Transportation, the Court concluded, had the discretion to implement an inspection system which balanced both safety and feasibility considerations.[84] In so doing, the Secretary inaugurated a system which did not require the

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[78] *Varig Airlines*, 467 U.S. at 815.

[79] *Id.* at 808. The discretionary function exception, according to the Court, "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id.* The Court seemed to advocate the "policy balancing" analysis utilized in previously mentioned cases. *See id.* at 185. Before decisions on immunity or liability were made, the Court should have pinpointed, first, the private citizen's interest in being compensated for a wrong committed by the government, and, second, the governmental interest in keeping that kind of activity free from judicial "second-guessing." *See supra* note 66 and accompanying text.

[80] *Varig Airlines*, 467 U.S. at 813. Even though the Court expressly reaffirmed its holding in *Dalehite*, the emphasis on the conduct, rather than the actor, was a substantial departure from the importance of the decision-maker in *Dalehite*. *Id.*; *see also* Johnston v. United States, 597 F. Supp. 374, 434 (D. Kan. 1984) (*Varig Airlines* interpreted as rejecting the planning/operational distinction because of emphasis on decision and not decision-maker). Several other lower courts abandoned the mechanical level-of-decision approach in favor of the nature-of-the-conduct analysis. *See supra* note 66 and accompanying text.

[81] *Varig Airlines*, 467 U.S. at 813-14.

[82] *Id.* at 813. By referring to the intent of Congress, the Court effectively skirted the issue of defining discretion. *Id.* Indeed, the Court admitted its omission by arguing that it was "unnecessary-and indeed impossible-to define with precision every contour of the discretionary function exception." *Id.*

[83] *Id.* at 814. Congress desired, through the exception, to inhibit civil litigation which impaired the orderly and efficient administration of government. *Id.*

[84] *Id.* at 820. The Court went to great lengths to emphasize the feasibility problems which the FAA would encounter under a more inclusive inspection program. *Id.* With fewer than 400 inspectors and limited funding, thorough inspection of every aircraft was practically impossible. *Id.* The Secretary, the Court held, had discretion to make, and act upon, such a finding. *Id.*

inspection of every plane.[85] Instead, the facts of each particular case governed when inspections should occur.[86] Since the FAA mandate did not require inspection of these aircraft, and agency discretion dictated its decision to forgo inspection, the discretionary function exception covered the governmental activities in question.[87]

Some commentators have argued that the Court, by failing to recognize the difference between the fact situations in *United Scottish* and *Varig*, did not address the crucial issues of whether the government was liable for negligent inspection and violation of mandatory regulations.[88] The resulting impact on the lower courts was one of confusion.[89] While some courts found that inspection and certification activities were discretionary, whether performed negligently or not,[90] others held that violation of regulatory directives and negligent inspec-

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[85] *Id.*

[86] *Id.* at 817. The Court cited a plethora of FAA guidelines, manuals, and regulations supporting the proposition that inspection was not mandatory and that the FAA based its decision on the manufacturer's "policies, quality control procedures, experience, inspection personnel, equipment, and facilities." *Id.*

[87] *Id.* at 820.

[88] Note, *supra* note 28, at 192. It has been suggested that if the FAA performed an inspection in *United Scottish*, but conducted it negligently, as alleged, the Court missed an opportunity to separate an agency's discretion to conduct an inspection from an agency's lack of discretion to perform the investigation negligently. *Id.*; *see also* Plave, *supra* note 13, at 222 (Court created a regulatory/nonregulatory distinction that applied immunity to negligent operational acts of regulatory agencies); Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception*, 110 MIL. L. REV. 115, 139-40 (1985) (*Varig* did not, but could have, decided issues of negligent inspection and violation of regulatory directives); Comment, *supra* note 28, at 1318 (Court ignored possibility of non-discretionary, negligent inspection). Nevertheless, the Court in *Varig* provided a useful analysis, touching on important issues like the status of the planning/operational distinction and the separation of powers concerns. Zillman, *supra*, at 134.

[89] 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 249.05, at 12-128 (1988). *Varig*, while attempting to clarify the issues, in fact confused them, according to some critics. *Id.* Because the Court failed to distinguish between negligent inspection and the lack of inspection, the message sent to the lower courts was confusing. *Id.* After *Varig*, some courts held that all governmental regulatory activity was free from liability, while others found that only truly discretionary acts were immune. *Id.*

[90] *See* Proctor v. United States, 781 F.2d 752, 753 (9th Cir.) (discretionary function exception applied to negligent certification), *cert. denied*, 476 U.S. 1183 (1986); Alabama Elec. Coop. v. United States, 769 F.2d 1523, 1527 (11th Cir. 1985) (seemingly rejecting *Varig* analysis and returning to planning/operational distinction); Hylin v. United States, 755 F.2d 551, 553-54 (7th Cir. 1985) (failure to discover defective junction box in mine inspection was discretionary function); Natural Gas Pipeline Co. v. United States, 742 F.2d 502, 504 (9th Cir. 1984) (certification process, including negligent inspection, was discretionary function).

tion resulted in liability.[91]

From the courts which found the government liable for negligent inspection, a broad consensus formed.[92] Indicative of this accord was the decision of the United States Court of Appeals for the Fifth Circuit in *Collins v. United States*.[93] In that case, an inspector from the Mine Safety and Health Administration, while investigating the mine at Belle Isle, found an impermissible level of methane gas, issued an Imminent Danger Order, and closed the mine.[94] After the inspector's supervisor overruled the judgment and reopened the mine, a subsequent explosion killed five people and injured seventeen.[95] The court rejected the government's contention that regulatory conduct was per se discretionary[96] and held that the paramount issue to be decided was whether the supervisor had the discretion to reopen the mine.[97] The court de-

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[91] *See* McMichael v. United States, 751 F.2d 303, 310 (8th Cir. 1985) (Defense Department found liable for failure to enforce safety requirements where enforcement, according to government manual, was mandatory); Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975) (Air Force's failure to provide adequate crosswalk was not discretionary function); Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975) (FBI agent's use of force was not discretionary function where guidelines and policy required otherwise); Griffin v. United States, 500 F.2d 1059, 1068-69 (3d Cir. 1974) (implementation of regulation controlling polio vaccine tests was not discretionary function); Moyer v. Martin Marietta Corp., 481 F.2d 585, 598 (5th Cir. 1973) (installation and approval of faulty ejection seat was not discretionary function).

[92] Zillman, *supra* note 28, at 36-38. In each of the cases finding the government liable for negligent inspection, the rank of the federal employee played no part; and in each the court found a violation of a statutory or regulatory mandate. *Id.* In contrast, some other courts found that not only policy matters, but also the actions carrying out those policies, were immune. Plave, *supra* note 13, at 231. Thus, once the policy decision was made, all attempts to implement that policy were likewise immune. *Id.*

[93] 783 F.2d 1225 (5th Cir. 1986).

[94] *Collins*, 783 F.2d at 1227. Complying with standard procedures, the inspector took methane readings of the mine and found that the level was .3%. *Id.* Accordingly, the original inspector classified the mine as "gassy" and closed it. *Id.*

[95] *Id.* Absent a regulation to the contrary, the supervisor, the court found, had the discretion to overrule an Imminent Danger Order. *Id.* However, regulations required a mine with more than .25% methane to be classified as "gassy" and operated as such. *Id.* at 1230 (citing 30 C.F.R. § 57.21-1(c) (1977)). Thus the regulatory mandate required the supervisor to declare the mine "gassy." *Id.*

[96] *Id.* at 1228. The government drastically extended the pronouncement in *Varig* that Congress clearly intended the exception to encompass the regulatory acts of the government. *Id.* The exception applied not only to discretionary regulatory conduct, the government argued, but also to non-discretionary conduct. *Id.* Regulatory activity was inherently discretionary, and therefore it was irrelevant whether the actor had actual choice or not. *Id.*

[97] *Id.* at 1229. As a fallback, the government argued that even if not all regulatory conduct was discretionary, then allowing suit in this instance amounted to judicial "sec-

termined that no such discretion existed and that the supervisor disobeyed a regulatory mandate.[98] Finally, the court held that there was no discretion to disobey a mandatory regulation.[99]

Gradually, it seemed, a general consensus formed in the lower courts that the negligent execution of a preexisting agency policy was actionable under the Federal Tort Claims Act.[100] Whether holding the government liable in these situations produced a desirable result, however, was a matter of debate.[101]

In the instant case, the Court reasoned that Congress created the discretionary function exemption to protect governmental acts based on public policy considerations,[102] and that Congress thus intended to shield only those actions based on an element of policy choice or judgment.[103] Contrary to what the Government averred,[104] the Court found that the exception covered only those regulatory activities which re-

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ond-guessing," conduct strictly forbidden by *Varig*. *Id.* The court, mindful of separation of powers concerns, held that the presence of "second-guessing" depended upon whether there was discretion to reopen the mine—that is, whether there was a policy judgment. *Id.* (citing 30 C.F.R. § 57.21-1(c) (1977)).

[98] *Id.* at 1230. Relying upon 30 C.F.R. § 57.21-1(c) (1977), the court found that the supervisor wrongfully opened the mine with a methane percentage in excess of .3%. *Collins*, 783 F.2d at 1230. Countering the government's averments that the court was participating in judicial meddling, the court responded that "[d]etermining whether a decision involves policy at all is not the same as scrutinizing the correctness of that policy decision." *Id.* at 1231. Instead, the court reasoned that there were regulatory mandates governing the supervisor's conduct and that the supervisor, in declassifying and reopening the mine, disobeyed a "flat command." *Id.*

[99] *Collins*, 783 F.2d at 1231.

[100] *See supra* note 55 and accompanying text.

[101] *See* Zillman, *supra* note 28, at 42 (effect was healthy judicial oversight of government action); Comment, *Defining the Government's Duty Under the Federal Tort Claims Act*, 33 VAND. L. REV. 795, 806 (1980) (authored by Thomas A. Varlen) (effect of holding government liable for negligent inspections was incentive to monitor more carefully). *But see* Plave, *supra* note 13, at 238 (*Varig* and *Berkovitz* offered no incentive for government to boost its enforcement, certification, and inspection activities); Comment, *supra*, at 807 (result may also be lessening of government safety programs and manufacturer's degree of care); Comment, *supra* note 28, at 1331-32 (allowing agencies to ignore their own rules undermined integrity of agency, the government, and regulatory conduct in general).

[102] Berkovitz v. United States, 108 S. Ct. 1954, 1959 (1988). The purpose of the discretionary function exception was to insulate government decision-making from judicial attack when the issues involved were the legitimate outcome of policy judgment. *Id.*

[103] *Id.* at 1958.

[104] *Id.* at 1960. The government initially argued that all regulatory functions of government agencies were exempt from liability since all regulatory activities were "discretionary." *Id.* This argument was the same as that presented in *Griffin*, *Varig*, and *Collins*. *See supra* notes 62, 95 and accompanying text.

quired policy decisions.[105] Because the exemption did not immunize all regulatory acts, the Court held that a proper analysis required an examination of the statutory and regulatory duties of the agency.[106] The Court further reasoned that since the statutes and regulations directed the government agencies in the instant case to receive data showing compliance before licensing and to test each batch of vaccine for compliance,[107] then those agencies had no alternative but to follow the directive.[108] Therefore, the Court found that because there was no element of choice or judgment involved, there was not governmental discretion to be protected.[109] Accordingly, the Court concluded that since there was no discretion, the Government was subject to liability

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[105] *Berkovitz*, 108 S Ct. at 1959. The Court, citing *Varig*, found that some regulatory activities involved policy decision-making and discretionary judgment. *Id.* In that case, the Court found that the Federal Aviation Administration's responsibilities did not require "spot-checking" every aircraft. *Id.* Instead, the Court concluded that, since the statute did not mandate "spot-checking" every aircraft, it was within the agency's discretion to decide when and where to inspect. *Id.* Analogizing *Varig* to the instant case, the Court found that some regulatory acts required discretion while others did not. *Id.* at 1959-60. Explicitly rejecting the government's argument, the Court relied upon both the wording of the statute and its legislative history to prove that federal agencies could be liable for their regulatory acts. *See supra* note 14 and accompanying text. First, the Court called attention to the language of the statue itself, which shields "discretionary" functions, not "regulatory" functions, from tort liability. *Berkovitz*, 108 S. Ct. at 1960. Second, the Court cited the legislative history of the Federal Tort Claims Act, which supported the proposition that Congress intended for the discretionary function exception to apply to the "discretionary acts of regulators, rather than to all regulatory acts." *Id.* at 1960 n.4; *see* H.R. REP. No. 1287, 79th Cong., 1st Sess., at 6 (1945) (discretionary function not applicable to all regulatory acts, only to those that were discretionary).

[106] *Berkovitz*, 108 S. Ct. at 1960. The Court finally discarded the government's arguments that all regulatory conduct was immune. *Id.* The Court's proper role was "focusing on the particular nature of the regulatory conduct at issue." *Id.* Thus courts found discretion or the lack of it only by examining the statutory and regulatory duties of the government body. *Id.*

[107] *Id.* at 1962-64. The Court found that the Division of Biologic Standards had violated a statutory directive by licensing Orimune before receiving the relevant test data. *Id.* at 1962. The Bureau of Biologics had allegedly contravened a similar regulation requiring it to test every batch of vaccine before it reached the general public. *Id.* at 1964; *see supra* note 4 and accompanying text.

[108] *Berkovitz*, 108 S. Ct. at 1959. Even counsel for the government admitted that the Division of Biologic Standards did not have the discretionary authority to issue a license without a showing that the product complied with regulatory standards. *Id.* at 1963 n.10.

[109] *Id.* at 1959. The purpose of the discretionary function exception was to insulate the government when it utilized its policy-making powers and, more importantly, to protect employees from fear of legal liability arising from their policy decisions. *Id.* When there was no policy decision at issue, there was no reason to protect the government. *Id.* The Court found that there was no discretion if the law explicitly controlled the course of action. *Id.*

in tort.[110]

The effect of *Berkovitz* is, in one sense, perfectly clear. The government will be held accountable for the negligent licensing activities of its employees.[111] Where regulatory standards are in place, federal agencies will be held to them; and where there is negligence, there will be relief. The United States Supreme Court has once again recognized the theory, implicit in *Indian Towing*, that the government is not required to act, but if it chooses to do so, it must act with due care. This nonfeasance/misfeasance distinction[112] comports with the layman's view of justice and is certainly consistent with the congressional intent behind the Federal Tort Claims Act.[113]

In another sense, however, the impact of *Berkovitz* is uncertain. On the one hand, the decision may lead to more careful and thorough licensing and certification. On the other hand, however, the government may be inclined to abandon, or sharply limit, its role as the protector of public safety.[114] The proper path to follow, in this writer's opinion, would be to maintain the inspection and licensing activities already in place, but shift the burden of showing compliance to the manufacturer, as Congress did for the FAA in *Varig*.[115] This measure, of course, would not, and should not, protect the government when negligent inspection or licensing occurs. It would, however, allow administrative oversight in areas of public safety while still placing liability for defective products where it rightly belongs, on the manufacturer.

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[110] *Id.* at 1965.

[111] *See supra* note 108 and accompanying text.

[112] *See supra* notes 57-58 and accompanying text.

[113] *See supra* note 103 and accompanying text.

[114] *See supra* note 100 and accompanying text.

[115] *See supra* notes 73, 75 and accompanying text.

Evidence — Prior Conviction of a Violent Crime Is Not Prima Facie Evidence of Propensity for Untruthfulness Under the Mississippi Rules of Evidence

Defendant[1] appealed his conviction of robbery in the Circuit Court of Hinds County[2] and assigned as error the admission of defendant's prior conviction of arson[3] for impeachment purposes pursuant to Mississippi Rule of Evidence 609(a).[4] The circuit court, in admitting evidence of the defendant's prior conviction, determined that the probative value of such evidence outweighed the potential prejudice to the defendant.[5] The defendant's credibility[6] was of particular importance because of his primary defenses of alibi[7] and mistaken identification.[8]

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[1] Defendant was Robert Hayes McInnis. McInnis v. State, 527 So. 2d 84 (Miss. 1988).

[2] *Id.* at 85. Defendant was convicted under Miss. Code Ann. § 97-3-83 (1972). *McInnis*, 527 So. 2d at 85. He was convicted of robbing Velma Craig as she left Kroger Grocery Store in Jackson, Mississippi. *Id.* at 84. The assailant knocked Craig to the ground, snatched her purse, and escaped on foot. *Id.*

[3] *McInnis*, 527 So. 2d at 85. The Circuit Court of Hinds County reserved ruling on a pre-trial motion in limine to exclude evidence of the defendant's prior arson conviction until such evidence was actually introduced at trial. *Id.* Following the defendant's direct examination, the prosecution offered the prior conviction to impeach the defendant's credibility and argued that the conviction had probative value since it involved a crime of violence. *Id.*

[4] *Id.* at 86. The evidentiary rule states, as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and *the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party* or (2) involved dishonesty or false statements, regardless of the punishment.

Miss. R. Evid. 609(a) (emphasis added).

[5] *McInnis*, 527 So. 2d at 85-86. The circuit court held that since the prior arson conviction was for a crime of violence, the probative value of evidence of the prior arson conviction was sufficient to overcome any possible prejudice to the defendant. *Id.*

[6] *Id.* at 84. A prior conviction may only be offered on the issue of the defendant's propensity for truthfulness while serving as a witness. *Id.* at 88. The conviction may not be used to show that the defendant acted in conformity with his criminal character. *Id.* Defendant's credibility was at issue because his defense depended upon a partially self-established alibi. *Id.*

[7] *Id.* at 84-85. Defendant contended that he was at his aunt's house at the time the robbery occurred. *Id.* at 85. The alibi was substantiated by several members of his family who were at his aunt's house. *Id.*

On appeal, the Mississippi Supreme Court, *held*, reversed and remanded for a new trial. Where a prior conviction of a violent crime does not involve an element of fraud, deceit, or dishonesty, the prior conviction is not sufficiently probative of a witness' propensity for untruthfulness to allow its introduction at trial for purposes of impeachment. *McInnis v. State*, 527 So. 2d 84 (Miss. 1988).

At common law, courts held a person convicted of a felony or misdemeanor involving dishonesty to be incompetent as a witness.[9] In 1848, the Mississippi Legislature abolished this common-law rule and permitted convicted felons to testify subject to the right of the prosecution to impeach their credibility.[10] In *Williams v. State*,[11] a 1906 decision, the Mississippi Supreme Court interpreted this statutory enactment in upholding a murder conviction.[12] The defendant's credibility was at issue, and the prosecution introduced evidence of prior convictions on cross-examination.[13] The *Williams* court held that a witness was automatically subjected to the right of the prosecution to impugn his credibility, even though the witness also happened to be the defendant.[14]

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[8] *Id.* at 84-85. Although the victim identified the defendant as her assailant, her initial description of the robber to the police was substantially different. *Id.* at 85.

[9] C. McCORMICK, McCORMICK ON EVIDENCE 93 (3d ed. 1984). This common-law rule had been abrogated in most common-law jurisdictions by statute or judicial decision by the early twentieth century. *Id.*

[10] HUTCHISON'S MISS. CODE § 8-1-18 (1848). The Mississippi statute abrogating the common-law rule stated:

> No conviction of any person for any offense, excepting perjury and subornation of perjury, shall disqualify or render such person incompetent to be sworn and to testify in any cause, matter or proceeding, civil or criminal; but such conviction may in all cases be given in evidence, to impeach the credibility of the person so sworn or testifying.

Id.

[11] 87 Miss. 373, 39 So. 1006 (1906).

[12] *Williams*, 87 Miss. at 373, 30 So. at 1006. The prosecution introduced the defendant's prior felony convictions to impeach his credibility. *Id.*

[13] *Id.* The defendant was the only eyewitness to the murder. *Id.* The jury declined to accept the defendant's version of how the murder occurred. *Id.*

[14] *Id.* at 374, 39 So. at 1007. The supreme court stated "that one of the incidents of the position of witness is the right of the opposing side to impeach his credibility by proving a previous conviction of a crime." *Id.*; *see* Brister v. Dunaway, 149 Miss. 5, 13, 115 So. 36, 39 (1927) (evidence of prior conviction for any offense held admissible to impeach credibility of witness); Brown v. State, 96 Miss. 534, 535, 51 So. 273, 274 (1910) (any number of prior convictions held admissible to discredit witness' testimony); McMasters v. State, 83 Miss. 1, 6, 35 So. 302, 303 (1903) (prior convictions held admissible for impeachment purposes when defendant testified as his own witness); M.C. ELLIS & P. WILLIAMS, MISSISSIPPI EVIDENCE § 4-6 (1983) (Mississippi statutory law provided for im-

In 1918, the United States Supreme Court also abandoned the common-law rule disqualifying felons from testifying.[15] The Court reasoned that justice would be more effectively served if all people with relevant information were allowed to testify with prior conviction evidence limited so as to bear only upon the weight and credibility of the testimony.[16] The first federal court to break with the tradition of automatically allowing prior felony convictions into evidence was the Court of Appeals for the District of Columbia Circuit in *Luck v. United States*.[17] The *Luck* court formulated a balancing test to weigh the probative value of evidence of a defendant's prior conviction against the prejudicial effect of such evidence.[18] The court held that there was no requirement forcing it to admit prior conviction evidence whenever a defendant testified in his own defense.[19] The *Luck* court recognized a duty to determine admissibility with due regard to the facts and circumstances of each individual case.[20] In certain exceptional cases, the court stated that a witness should be allowed to testify without fear of having his credibility diminished.[21] The *Luck* court suggested a number of factors which should be considered by the trial court in its determination of the admissibility of prior convictions, including the nature of the previous conviction and the age and prior criminal record of

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peachment of witnesses by prior conviction of any crime except minor traffic offenses).

[15] Rosen v. United States, 245 U.S. 467, 471 (1918). The Court followed the widespread trend of courts and legislatures toward removing disabilities from witnesses. *Id.* at 471-72; *see* Note, *Impeachment with Prior Convictions Under Federal Rule of Evidence 609(a)(1): A Plea for Balance*, 63 WASH. U.L.Q. 469, 470-71 (1985) (discussing abandonment of common-law rule prohibiting felons from testifying).

[16] *Rosen*, 245 U.S. at 471. The Court stated, "[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts of the case, leaving the credit and weight of such testimony to be determined by the jury . . . ." *Id.*

[17] 348 F.2d 763 (D.C. Cir. 1965).

[18] *Luck*, 348 F.2d at 769. The court sought to "strike a reasonable balance between the interests of the defendant and of the public." *Id.*

[19] *Id.* at 768. The court viewed the District of Columbia statute regarding prior conviction impeachment as allowing room "for the operation of a sound judicial discretion" with regard to the circumstances in individual cases. *Id.*

[20] *Id.* The court stated that the trial court should carefully consider whether the prior conviction would aid or hinder the cause of justice in a particular instance. *Id.*

[21] *Id.* The court determined that in certain circumstances it was a more "just, humane, and expedient solution" to allow a defendant to testify without fear of the "overwhelming prejudice" likely to result from disclosing prior convictions. *Id.* n.7; *see* Comment, *Impeachment Under Rule 609(a): Suggestions for Confining and Guiding Trial Court Discretion*, 71 NW. U.L. REV. 655, 661-64 (1976) (discussion of competing policy values implicit in balancing analysis).

the witness.[22]

Two years after *Luck*, in *Gordon v. United States*,[23] the Court of Appeals for the District of Columbia Circuit strongly reaffirmed its position on impeachment by prior conviction.[24] *Gordon* involved the admissibility of a prior conviction of the complaining witness in a robbery prosecution.[25] The *Gordon* court recognized that while certain crimes involving dishonesty reflected negatively on the character and credibility of the witness,[26] other crimes may have only a minimal bearing on the witness' propensity for truthfulness.[27] In making the determination of a prior conviction's admissibility, the court promulgated a set of guidelines for the trial court to weigh.[28] The *Gordon* court viewed the closeness in time of a conviction[29] and the public policy of allowing a witness to testify as important factors.[30] The *Gordon* court recognized that the similarity of the prior crime to the charged crime was of particular importance because of the excessive weight a jury would likely place on the conviction.[31] The *Gordon* court concluded that the guide-

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[22] *Luck*, 348 F.2d at 769. *Luck* placed a premium on avoiding prejudice to criminal defendants at the expense of excluding some relevant information. *Id.*; *see* Note, *Federal Rules of Evidence—Rules 609(a) and 403—Witnesses—Impeachment by Prior Criminal Conviction*, 22 DUQ. L. REV. 535, 540-42 (1984).

[23] 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

[24] *Gordon*, 383 F.2d at 939. The court reiterated the view that trial courts have some discretion over admitting prior conviction evidence for impeachment purposes. *Id.*

[25] *Id.* at 938. The defendant sought a new trial on the basis of new evidence that the sole government witness at defendant's trial had a previous conviction of larceny. *Id.*

[26] *Id.* at 940. The court regarded crimes of deceit, fraud, or stealing as acts which reflected a witness' propensity for untruthfulness. *Id.*

[27] *Id.* The court considered violent acts which may result from a provocation, a bad temper, or a hostile nature as usually having no bearing on propensity for truthfulness. *Id. But see* United States v. Brown, 409 F. Supp. 890, 892 (W.D.N.Y. 1976) (prior criminality of any kind has some pertinency to credibility, since one who has sinned in past is more likely to give false testimony than sinless witnesses).

[28] *Gordon*, 383 F.2d at 940-41. The court listed a number of factors which the trial court should consider in applying its "judicial discretion" to the facts of the case. *Id.* at 941.

[29] *Id.* at 940. The court held that a person who has led a crime-free life, except for one instance in the distant past, should not be unduly prejudiced. *Id.*

[30] *Id.* The court recognized that in certain cases the witness' testimony is so critical that the jury should listen to the witness' version of the event. *Id.* at 940-41.

[31] *Id.* at 940. The court recognized that regardless of the jury instructions, a jury will often convict the accused on the basis of "if he did it before he probably did so this time." *Id.* Defendants who elected to testify faced a high risk that the prior crime would carry an inordinate amount of weight with the jury. *Id.*; *see* Michel, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 400-01 (1980). Defendants who exercised their fifth amendment privilege to decline to testify faced a "natural inference" on the part of the jury that the defendant

lines provided were to serve merely as an aid to the trial court in performing the difficult balancing process.[32] The Federal Rules of Evidence incorporated the *Luck-Gordon* formulation[33] for balancing a conviction's probative and prejudicial effects into that general federal standard set forth in Rule 609(a).[34]

An important early case interpreting Rule 609(a) of the Federal Rules of Evidence was *United States v. Jackson*.[35] *Jackson* involved an assault conviction which was introduced to impeach the defendant's credibility in a robbery prosecution.[36] The *Jackson* court noted that Congress adopted the Federal Rules of Evidence both in order to encourage "defendants to testify by protecting them against unfair prejudice"[37] and to "protect the government's case against unfair mis-

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must be guilty since he failed to explain the evidence. *Id.* at 401-04.

[32] *Gordon*, 383 F.2d at 941. The court added that "the very nature of judicial discretion precludes rigid standards for its exercise." *Id.*; *see* Comment, *Evidence—The 609(a)(1) Balancing Test for Admission of Prior Felony Convictions: What Factors Are Applicable in Tennessee*?, 15 MEM. ST. U.L. REV. 451, 454-56 (1985) (discussion of necessity for each factor employed in *Gordon* balancing test).

[33] FED. R. EVID. 609(a) advisory committee's note; *see also* 51 F.R.D. 315, 393 (1971) (source for balancing provision in Rule 609(a) was the formulation in *Luck*). *See generally* Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063, 1070-73 (1986) (discussion of legislative history of Rule 609 including many amendments and alterations made before reaching final version); Note, *Evidence*—Diggs v. Lyons: *The Use of Prior Criminal Convictions to Impeach Credibility in Civil Actions Under Rule 609(a)*, 60 TUL. L. REV. 863, 865-67 (1986) (discussion of compromise between Senate version which permitted introduction of all felonies for impeachment and House of Representatives' version which permitted introduction of crimes involving dishonesty only under Rule 609).

[34] FED. R. EVID. 609(a). Rule 609(a) provided for a two-part test to determine the admissibility of prior convictions. *Id.* Subsection (1) allowed the use of evidence of a prior conviction for the sole purpose of impeachment, but only when the court made a determination that the probative value of the conviction exceeded the potential prejudicial effect to the defendant. *Id.* Subsection (2) allowed admittance of prior convictions of all crimes involving dishonesty regardless of the prejudicial effect. *Id.*; *see* United States v. Brewer, 451 F. Supp. 50, 53 (E.D. Tenn. 1978) (many standards developed in *Luck* and *Gordon* are still relevant under Rule 609). *See generally* Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 7-12 (1976) (compromise between those who urged strict limits on admissibility and those who argued for unlimited use of prior convictions led to confusing rule loaded with exceptions and qualifications).

[35] 405 F. Supp. 938 (E.D.N.Y. 1975).

[36] *Jackson*, 405 F. Supp. at 939. The prosecution's case did not "necessarily hinge" on its ability to destroy the credibility of the defendant. *Id.* at 943.

[37] *Id.* at 942. The trial court should have made rulings on the admissibility of prior convictions as early as possible in order to encourage defendants to testify. *Id.*

representation of an accused's non-criminality."[38] The court reasoned that while a prior conviction of a violent crime seemed to have little bearing on a witness' propensity for truthfulness,[39] the jury could use the conviction for the improper purpose of determining the guilt of the defendant.[40] The *Jackson* court held that the balance shifted in favor of admitting the defendant's prior conviction when the jury would otherwise have a false impression of the defendant's lack of prior convictions or when the credibility of the prosecution's witness was first impeached.[41]

The Court of Appeals for the District of Columbia Circuit provided further clarification about the probative value of violent crimes in *United States v. Lipscomb*.[42] The *Lipscomb* court recognized that confusion had developed over whether evidence of prior felony convictions was probative of credibility.[43] The court found that the phrasing

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[38] *Id.* The trial court must have reconciled the competing goals of protecting the defendant and protecting the government's case. *Id.*

[39] *Id.*; *see* United States v. Larsen, 596 F.2d 347, 348 (9th Cir. 1979) (evidence of prior conviction for child molestations bore little on credibility in counterfeiting prosecution). *But see* Petty v. Ideco, A Div. of Dresser Indus., 761 F.2d 1146, 1148 (5th Cir. 1985) (prior kidnapping conviction of plaintiff was probative of untruthfulness in products liability case); United States v. Washington, 746 F.2d 104, 105-06 (2d Cir. 1984) (nine-year old robbery conviction admitted for impeachment purposes in bank robbery prosecution); United States v. De Bordez, 741 F.2d 182, 184 (8th Cir.) (prior conviction of bank robbery more probative than prejudicial in bank robbery prosecution), *cert. denied*, 469 U.S. 1089 (1984).

[40] *Jackson*, 405 F. Supp. at 942. The court suggested that a recent felony conviction may unduly prejudice the jury against the defendant, although the prior conviction would only be admissible on the issue of credibility. *Id.* at 942-43; *see* Betro, *The Use of Prior Convictions to Impeach Criminal Defendants—Do the Risks Outweigh the Benefits?*, 4 ANTIOCH L.J. 211, 211-13 (1986) (juries have refused to confine evidence of prior conviction to limited purpose of impeachment but instead have used prior conviction evidence to determine guilt).

[41] *Jackson*, 405 F. Supp. at 943. When a witness tried to convey a false impression of a lack of prior convictions, the court held that the defendant would have an unfair advantage. *Id.* The court reasoned that a false impression of innocence would cause the jury to overestimate the defendant's propensity for truthfulness. *Id.* When impeachment evidence is offered against the prosecution's witnesses, the court recognized that the defendant's credibility should also be vulnerable to impeachment to ensure that both sides have an equal loss of credibility. *Id.*

[42] 702 F.2d 1049 (D.C. Cir. 1983). *Lipscomb* involved the admission of an eight-year-old robbery conviction in a drug prosecution. *Lipscomb*, 702 F.2d at 1053.

[43] *Id.* at 1056. *Compare* United States v. Breckenridge, 782 F.2d 1317, 1323 (5th Cir. 1986) (conviction for possession of marijuana with intent to sell held admissible for impeachment in prosecution for using firearm in commission of felony) *and* United States v. Langston, 576 F.2d 1138, 1139 (5th Cir.) (prior conviction for robbery by assault held admissible in bank robbery prosecution), *cert. denied*, 439 U.S. 932 (1978) *with* United

of Rule 609(a) suggested that all prior felony convictions must meet a prima facie relevancy requirement which courts must then evaluate in terms of possible prejudice to the defendant.[44] The *Lipscomb* court considered this approach to be in line with the pre-Rule 609 approach which regarded all felony convictions as at least nominally probative of credibility.[45] In conclusion, the court stated that the risk of undue prejudice to the defendant was almost nonexistent when a defense witness other than the defendant was impeached.[46] The *Lipscomb* court thus reaffirmed the belief that all felony convictions are somewhat probative on the issue of truthfulness.[47]

The Court of Appeals for the Eighth Circuit recently addressed the probative value of a prior conviction in *United States v. Walker*.[48] *Walker* involved the admission of a prior conviction for arson in an assault prosecution.[49] The *Walker* court held that the District Court of North Dakota was not required to examine the specific facts and circumstances of each conviction to enable it to rule on the admissibility

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States v. Gross, 603 F.2d 757, 758-59 (9th Cir. 1979) (government failed to offer theory explaining how narcotics conviction could be more probative than prejudicial in assault prosecution) *and* United States v. Harvey, 588 F.2d 1201, 1203 (8th Cir. 1978) (assault conviction held inadmissible because it did not involve dishonesty or false statements).

[44] *Lipscomb*, 702 F.2d at 1058. "The phrasing 'shall be admitted . . . but only if,' plus the phrase '*the* probative value,' suggests that all prior convictions meet a threshold relevance requirement . . . ." *Id.*

[45] *Id.* at 1058-59. The court determined that the pre-Rule 609 approach pioneered by *Luck* assumed that a prior conviction was probative of credibility absent undue prejudice. *Id.* at 1058 (citing Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1965)).

[46] *Id.* at 1063. The court found that a much smaller risk of prejudice to the defendant existed when another witness is impeached by a prior conviction because "the jury cannot directly infer the defendant's guilt from someone else's criminal record." *Id.* However, the court conceded there still existed the possibility that the jury would presume the defendant to be guilty by association. *Id.*; *see* Campbell v. Greer, 831 F.2d 700, 703-04 (7th Cir. 1987) (when ruling on admissibility of prior convictions, only consideration is prejudice to defendant); Linskey v. Hecker, 753 F.2d 199, 201 (1st Cir. 1985) (embarrassment to witness other than defendant held not to be consideration in determining whether to exclude prior convictions).

[47] *Lipscomb*, 702 F.2d at 1073. The court stated, "Rule 609(a)(1) of the Federal Rules of Evidence embodies a congressional belief that all felony convictions less than 10 years old have at least some probative value on the issue of credibility." *Id.*

[48] 817 F.2d 461 (8th Cir.), *cert. denied*, 484 U.S. 863 (1987). Defendant alleged that the district court erred in allowing his prior conviction into evidence for impeachment purposes. *Walker*, 817 F.2d at 463.

[49] *Id.* at 463; *see* United States v. Russo, 540 F.2d 1152, 1156 (1st Cir.) (prior conviction of arson held more probative than prejudicial in counterfeiting prosecution where defendant's credibility was important issue), *cert. denied*, 429 U.S. 1000 (1976).

of a felony.[50] The court concluded that the trial court did not abuse its discretion when it admitted the arson conviction as evidence bearing on the credibility of the defendant.[51]

Although federal law regarding the admissibility of evidence of prior convictions developed rapidly during this period, Mississippi law remained unchanged and continued to allow the admission of evidence of prior convictions for felonies and misdemeanors.[52] Mississippi law changed radically in 1986 when the Mississippi Supreme Court promulgated the Mississippi Rules of Evidence.[53] The Mississippi Supreme Court interpreted the new rule regarding admissibility of evidence of prior convictions for the first time in *Peterson v. State*.[54] The *Peterson* court adopted a balancing test similar to that employed by

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[50] *Id.* at 464. The court stated that Rule 609(a) does not contain a requirement ordering the trial court to "examine the specific facts and circumstances" concerning the probative value of the prior conviction. *Id.*; *see* FED. R. EVID. 609(a) (trial court not required to examine facts and circumstances of prior conviction in balancing probative and prejudicial values).

[51] *Walker*, 817 F.2d at 464. The court that found the trial court properly compared the probative value of the evidence to its prejudicial effect before admitting it. *Id.*

[52] MISS. CODE ANN. § 13-1-11 (1972). The statute states:

> A conviction of a person for any offense, except perjury or subornation of perjury, shall not disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. A person convicted of perjury or subornation of perjury shall not afterwards be a competent witness in any case, although pardoned or punished for the same.

Id.; *see* Johnson v. State, 452 So. 2d 850, 854 (Miss. 1984) (prosecutor could specify each prior conviction of defendant during cross-examination of defendant); Burns v. State, 438 So. 2d 1347, 1351 (Miss. 1983) (defendant's prior convictions were admissible in marijuana prosecution); Sanders v. State, 352 So. 2d 822, 824 (Miss. 1977) (defense in armed robbery prosecution could cross-examine prosecution witness about prior felony and misdemeanor offenses).

[53] MISS. R. EVID. 609(a). The rule states:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the punishment.

Id.; *see* C. STATON, MISSISSIPPI EVIDENCE 133-34 (2d ed. 1988) (explaining major change in Mississippi law regarding admissibility of evidence concerning prior convictions); *cf.* Tollison, *A Plea for Adoption of the Proposed Mississippi Rules of Evidence*, 53 MISS. L.J. 49, 49-54 (1983) (arguing for adoption of current Mississippi Rules of Evidence).

[54] 518 So. 2d 632 (Miss. 1987). *Peterson* involved a prior conviction for marijuana used to impeach the defendant in a prosecution for the sale of marijuana. *Peterson*, 518 So. 2d at 634.

many federal circuits in determining the admissibility of prior conviction evidence.[55] The court listed several factors to be considered by the trial court, including the nature of the prior crime,[56] the "freshness of the conviction,"[57] the "similarity between the past crime and the charged crime,"[58] "the importance of the defendant's testimony,"[59] and the relative importance of the credibility issue.[60] The *Peterson* court held that trial courts must weigh the factors and use their analysis to make an on-the-record determination of whether the probative value of evidence concerning a prior conviction outweighed its prejudicial effect.[61]

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[55] *Id.* at 636. The *Peterson* court employed a five-factor balancing test similar to the test first outlined in *Gordon*. *Id.* at 636-38; *see* United States v. Barnes, 622 F.2d 107, 109 (5th Cir. 1980) (court used balancing test in determining admissibility of prior conviction evidence); United States v. Crawford, 613 F.2d 1045, 1052 (D.C. Cir. 1979) (court adopted five-factor balancing test similar to test in *Gordon*); United States v. Hawley, 554 F.2d 50, 53 (2d Cir. 1977) (court used five-factor balancing analysis in weighing probative and prejudicial value of prior conviction).

[56] *Peterson*, 518 So. 2d at 636-37. The court recognized that a crime which did not involve dishonesty weighed heavily against admitting the prior conviction. *Id.* at 637.

[57] *Id.* at 636-37. The court determined that a conviction within one year before the crime for which the defendant was being tried weighed heavily in favor of admissibility. *Id.* at 637.

[58] *Id.* at 636-37. The court held that the closer the similarity between the prior conviction and the charged crime, the greater the likelihood that the prior conviction required exclusion. *Id.* at 637; *see also* Johnson v. State, 525 So. 2d 809, 812-13 (Miss. 1988) (prior conviction of rape which occurred 15 minutes prior to second rape held inadmissible for impeachment purposes in second rape prosecution).

[59] *Peterson*, 518 So. 2d at 636-37. The court found that since the defendant was the only witness to the crime, the importance of his testimony weighed heavily against admitting the prior conviction. *Id.* at 637; *cf.* United States v. Oakes, 565 F.2d 170, 171 (1st Cir. 1977) (advance rulings on admissibility of prior convictions are advantageous to defendant but are discretionary); Note, *Denial of Advance Rulings on Admissibility of Prior Convictions for Impeachment Purposes: Chilling Effect on Defendant's Right to Testify*, 52 UMKC L. Rev. 477, 481-86 (1984) (advance rulings eliminated uncertainty of admissibility of prior conviction and thus aided defendant in preparing a more effective defense).

[60] *Peterson*, 518 So. 2d at 636-38. The court stated that a defense which relied upon the importance of the credibility of the defendant weighed heavily in favor of the admissibility of the prior conviction. *Id.* at 637.

[61] *Id.* at 636; *see also* United States v. Preston, 608 F.2d 626, 639 (5th Cir. 1979) (trial judge must make on-the-record finding that probative value of prior conviction exceeds its prejudicial effect to defendant before admitting prior conviction evidence); United States v. Mahone, 537 F.2d 922 (7th Cir.) (after hearing, trial court should make explicit on-the-record finding that probative value of prior conviction exceeds its prejudicial effect), *cert. denied*, 429 U.S. 1025 (1976); Note, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609*, 64 Cornell L. Rev. 425-31 (1979) (on-the-record findings promoted greater consistency in rulings).

In the instant case, the court reasoned that Mississippi Rule of Evidence 609(a) limits the use of prior convictions to impeachment of the defendant's credibility as a witness.[62] Therefore, the defendant's prior conviction must be logically related to his "propensity for truthfulness."[63] The court determined that the prosecution[64] had failed to make a prima facie showing that the conviction was probative of untruthfulness.[65] The court held that, to meet the prima facie burden of proof, the prosecution must show that the arson conviction involved an element of fraud, deceit, dishonesty, or other element suggesting a propensity for lying.[66] The court further held that the failure of the prosecution left nothing for the trial court to balance against the prejudicial effect of the evidence to the defendant and that the prior conviction of the defendant for first degree arson was therefore inadmissible.[67]

Mississippi evidence law regarding prior convictions has undergone a dramatic transformation from automatic admissibility of both felonies and misdemeanors[68] to the *McInnis* approach requiring a prima facie showing that the felony conviction is probative of untruthfulness.[69] In *McInnis* the Mississippi Supreme Court modified the balancing approach relied upon by the majority of federal courts.[70] The court added a preliminary step to the standard balancing approach

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[62] McInnis v. State, 527 So. 2d 84, 88 (Miss. 1988). The court interpreted Rule 609 to allow the prosecution to introduce evidence of a prior conviction during cross-examination of the witness for the limited purpose of impeachment of his honesty as a witness. *Id.*

[63] *Id.* The court required the prosecution to show that the prior conviction was more probative of untruthfulness than prejudicial in its effect in order for the prior conviction to be admissible. *Id.* at 87.

[64] *Id.* at 85. The prosecution offered only that the prior felony conviction was "a crime of violence" and first degree arson. *Id.* The trial court ruled that simply because the defendant had been convicted of first degree arson, evidence of that conviction had a probative value which outweighed "the detrimental factor to the Defendant." *Id.* at 85-86. The defendant contended that the conviction was being impermissibly used to show the defendant's propensity to commit further violent crimes. *Id.* at 87.

[65] *Id.* at 87-88. The court reasoned that many types of arson, such as pyromania, do not involve an element of dishonesty or deceit. *Id.* at 88-89 (quoting W. FAULKNER, *Barn Burning*, in COLLECTED STORIES 7-8, 20-21 (1977)). The court recognized that the prosecution failed to present the underlying facts of the arson conviction which could have shown an element of dishonesty. *Id.* at 87.

[66] *Id.* at 88. The court held that the prosecution had failed to meet its initial burden of proof that the prior conviction had any probative value of truthfulness. *Id.*

[67] *Id.* at 89-90. The court reversed the conviction and remanded the case for a new trial on all issues.

[68] *See supra* notes 10-14 and accompanying text.

[69] *See supra* notes 62-66 and accompanying text.

[70] *See supra* notes 28, 55 and accompanying text.

found in Rule 609(a).[71] Before balancing the probative value of the prior conviction against the prejudicial effect to the defendant, the court required the prosecution to make a prima facie showing that the prior conviction contained an element of fraud, deceit, dishonesty, or other element suggesting a propensity for lying.[72] The approach adopted seems inherently flawed in its failure to recognize that all felony convictions are somewhat probative on the issue of truthfulness.[73] Furthermore, the added step requiring a prima facie showing seems to serve little, if any, real purpose. Where the prosecution can make the prima facie showing, the court must still balance the probative value against the prejudicial effect. Where the prosecution cannot meet the prima facie test, the court may certainly disallow admittance of the conviction by finding that prejudicial effect outweighs probativeness.[74]

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[71] *See supra* notes 63-66 and accompanying text.

[72] *See supra* notes 34, 66 and accompanying text.

[73] *See supra* notes 44, 45, 66 and accompanying text.

[74] Subsequent decisions by the Mississippi Supreme Court have largely ignored the *McInnis* requirement of a prima facie showing of dishonesty to admit evidence of prior felony convictions. These later decisions seem to rely entirely on the "more probative than prejudicial" standard of Rule 609(a). *See* Hawkins v. State, 538 So. 2d 1204 (Miss. 1989) (court held prior armed robbery conviction was more probative than prejudicial; prima facie showing of element of dishonesty not required); Singer v. State, 536 So. 2d 10 (Miss. 1988) (court reversed conviction due to trial court's failure to make determination that probative value of bank robbery conviction outweighed prejudicial effect to defendant); Johnson v. State, 525 So. 2d 809 (Miss. 1988) (court did not require prima facie showing that prior rape conviction involved element of dishonesty in finding evidence of prior conviction more prejudicial than probative under Rule 609(a)).

Class Action — Bankruptcy — Bankruptcy Judge May Exercise Discretion To Allow a Representative To File a Class Proof of Claim in a Bankruptcy Proceeding

Creditors[1] filed a class proof of claim[2] in debtor's[3] bankruptcy, seeking to recover damages prayed for in a pending state court class action[4] which alleged fraud[5] on the part of a subsidiary of the debtor.[6] The debtor objected to the representative proof of claim,[7] but the Bankruptcy Court for the Northern District of Illinois overruled the debtor's objection.[8] The United States District Court for the Northern

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[1] Creditors, Clear and Doris Elaine Huddleston, were owners of an insurance policy issued by Reserve Insurance Company. *In re* American Reserve Corp., 840 F.2d 487, 488 (7th Cir. 1988).

[2] *Id.* The creditors filed the proof of claim on behalf of themselves and all other Reserve Insurance Company policy-holders who purchased policies between 1977 and 1979. *Id.*

[3] *Id.* The debtor, American Reserve Corporation, was a holding company which owned all of Reserve Insurance Company's stock. *Id.*

[4] *Id.* In 1979, the creditors had filed a state court class action as plaintiffs representing all Reserve Insurance Company policy-holders who purchased policies between 1977 and 1979. *Id.* In 1980, prior to a state court decision on certification of plaintiffs' class, the debtor filed its bankruptcy petition. *Id.* The parties assumed that the debtor's bankruptcy petition automatically stayed the creditors' state court class action against Reserve Insurance Company. *Id. See generally* 11 U.S.C. § 362 (1982) (detailing when filing of bankruptcy petition stays other proceedings). The court in the instant case did not rule on the propriety of this assumption. *American Reserve Corp.*, 840 F.2d at 488 & n.1.

[5] *American Reserve Corp.*, 840 F.2d at 488. In the state court class action, the creditors claimed that between 1977 and 1979 Reserve Insurance Company issued policies against reserves it knew were insufficient. *Id.*

[6] *Id.* The creditors' class proof of claim assumed that the debtor was liable for the debts of its subsidiary, Reserve Insurance Company. *Id.* at 488 n.1. The debtor did not dispute this assumption, and the court in the instant case did not address this issue. *Id.*

[7] *Id.* at 488. The debtor argued that each of the policy-holders represented by the creditors' class proof of claim had to file individual claims because class proofs of claims were not permitted by the Bankruptcy Code or Rules. Huddleston v. Holland (*In re* American Reserve Corp.), 71 Bankr. 32, 33 (Bankr. N.D. Ill. 1987), *rev'd sub nom. In re* American Reserve Corp., 840 F.2d 487 (7th Cir. 1988).

[8] *Huddleston*, 71 Bankr. at 33. In reaching an unprecedented decision on the validity of a class proof of claim, the bankruptcy court relied primarily on the expanded definition of a bankruptcy claim set forth in § 101(4) of the 1978 Bankruptcy Code. *Huddleston*, 71 Bankr. at 33 (citing 11 U.S.C. § 101(4) (1982)). Section 101(4) provides in relevant part: " '[C]laim' means - (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Bankruptcy Reform Act

District of Illinois reversed the bankruptcy court's ruling.[9] On appeal,[10] the United States Court of Appeals for the Seventh Circuit, *held*, reversed and remanded.[11] Where the claims held by a class of claimants give rise to substantial prospects of compensation for the claimants or deterrence to wrongdoers, and where class litigation will not unduly complicate or delay the proceedings, a bankruptcy judge should exercise discretion to allow a representative to file a class proof of claim in bankruptcy. *In re American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988).

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of 1978, 11 U.S.C. § 101(4) (1982). The bankruptcy court reasoned that Congress' expansion of the kinds of rights recognized in bankruptcy encompassed class proofs of claims. *Huddleston*, 71 Bankr. at 33-34. Furthermore, the bankruptcy court concluded that class proofs of claims are economically advantageous because they allow issues affecting the entire class to be litigated in one proceeding, thus saving the resources of both the court and the parties. *Id.* at 34-35.

[9] *Huddleston*, 71 Bankr. at 35. The district court relied on § 501 of the Bankruptcy Code and Bankruptcy Rule 3001(b) to conclude that class proofs of claims are prohibited by the 1978 Bankruptcy Code and the Rules of Bankruptcy Procedure. *Huddleston*, 71 Bankr. at 34-35. The district court noted that § 501 provides for only three situations in which a person is allowed to file a claim on behalf of another. *Id.* at 34. Section 501 allows indentured trustees, co-debtors, and debtors or trustees to file proofs of claims on behalf of others under certain conditions. *Id.* (citing 11 U.S.C. § 501(a)-(c) (1982)). Bankruptcy Rule 3001(b) provides in pertinent part that "[a] proof of claim shall be executed by the creditor or the creditor's authorized agent . . . ." R. BANKR. P. 3001(b). The district court reasoned that since section 501 of the Bankruptcy Code does not contain a provision allowing a creditor who purportedly represents a class of similarly situated creditors to file a class proof of claim, and since such a creditor is not an authorized agent of the class in accordance with Bankruptcy Rule 3001(b), then class proofs of claims are prohibited by both the Rules of Bankruptcy Procedure and the Bankruptcy Code. *Huddleston*, 71 Bankr. at 34-35.

The district court pointed out that the judicial efficiency rationale which generally supports class litigation is inapplicable to class proofs of claims because a simple, single-page form suffices as a proof of claim and because a proof of claim has no filing fee. *Id.* at 35. However, the district court noted that requiring each creditor to file an individual proof of claim would not eliminate class actions from bankruptcy proceedings. Bankruptcy judges may allow class actions during the litigation stage of the proceeding when the bankruptcy judge determines the merits of the various claims filed during the proof of claim stage. *Id.* The district court reasoned that discretionary use of the class action at the litigation stage would allow bankruptcy courts to take advantage of the judicially efficient aspects of the procedure. *Id.*

[10] *American Reserve Corp.*, 840 F.2d at 488. The appeal taken from the district court's ruling was an interlocutory appeal under 28 U.S.C. § 1292(b) (1982). *American Reserve Corp.*, 840 F.2d at 488.

[11] *American Reserve Corp.*, 840 F.2d at 494. Although the court of appeals reserved the district court's holding, it did not find in favor of the creditors' class proof of claim, but remanded to the bankruptcy court for its decision in light of the appellate court's reasoning. *Id.* at 493-94.

The creditor's bill was a nineteenth-century precursor of the class action in America.[12] Prior to the Bankruptcy Act of 1898,[13] the common-law creditor's bill allowed a single creditor to file a claim in equity on behalf of himself and all other similarly situated creditors.[14] A leading case which endorsed such a representative use of a creditor's bill was *Richmond v. Irons*.[15] In *Richmond*, a judgment creditor filed a bill in equity on behalf of himself and all other creditors of a bankrupt national bank.[16] The plaintiff's bill alleged that the voluntary liquidation of the bank was fraudulent and requested a judicial administration of the bank's affairs.[17] The United States Supreme Court, relying

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[12] S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 222 (1987).

[13] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *amended by* Act of June 22, 1938, ch. 575, 52 Stat. 840 (both repealed 1978).

[14] S. YEAZELL, *supra* note 12. The creditor's bill exemplified the development of class litigation in America as an "ad hoc response" to the problems of particular groups, such as similarly situated creditors of a bankrupt entity having a unified interest in preserving the debtor's estate for marshaling and distribution. *Id.* at 220-22; *see* Yeazell, *Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1085-86 (1980)(early class litigation was applicable to broad range of cases involving problems of particular groups).

[15] 121 U.S. 27 (1877); *accord* Handley v. Stutz, 137 U.S. 417, 366-70 (1890)(allowing judgment creditors of insolvent corporation to file bill in equity on behalf of all similarly situated creditors against corporation and stockholders); Johnson v. Waters, 111 U.S. 640, 641, 674 (1884) (allowing one creditor to bring creditor's bill on behalf of himself and all other creditors against bankrupt estate). In *Handley*, the United States Supreme Court held that a creditor's bill could be utilized only in a representative capacity if the bill sought to attach the unpaid stock subscriptions of a bankrupt corporation. *Handley*, 137 U.S. at 369. The Court stated that "[s]uch a [creditor's] bill can only be maintained by one or more creditors on behalf of all, and not by any one creditor to secure payment of his own debt to the exclusion of others." *Id.*; *see also* Patterson v. Lynde, 106 U.S. 519, 521 (1882)(holding that no one creditor can bring creditor's bill to attach delinquent stock subscription solely as satisfaction of his own debt); Sawyer v. Hoag, 84 U.S. (17 Wall.) 610, 622 (1873) (same); *cf.* Hatch v. Dana, 101 U.S. 205, 210-15 (1879) (sustaining bill of single creditor brought on behalf of other creditors who apparently did not exist).

[16] *Richmond*, 121 U.S. at 34. The plaintiff creditor's original bill was filed solely on his own behalf. *Id.* at 28-29. However, the Court allowed the plaintiff to amend his original bill so that it represented the plaintiff creditor and all other creditors of the bank. *Id.* at 31. The United States Supreme Court reasoned that since the rule of distribution utilized in the judicial administration of a liquidated corporation was the same whether the creditor filing suit did so in his own right or on behalf of himself and other creditors, the amendment of plaintiff creditor's original bill was of little significance. *Id.* at 44.

[17] *Id.* at 29, 43-44. Plaintiff alleged that upon the bank's voluntary liquidation, the bank president, acting in concert with certain bank stockholders, fraudulently appropriated assets of the bank for the settlement of certain bank debts and for his own use. *Id.* at 29, 32. Plaintiff claimed that these actions violated his and other bank creditors' interests. *Id.*

in part on direct legislative authority,[18] held that the representative litigation was permissible.[19] The Court reasoned that since all creditors had equal rights to the bank's assets, plaintiff creditor's representative bill was an efficient means to settle the bank's affairs.[20] The expanding development of the receivership[21] in bankruptcy proceedings eventually curtailed the necessity and thus the utilization of the creditor's bill.[22]

In the 1968 case *In re Commonwealth Finance Corp.*,[23] a United States district court bankruptcy referee dealt with what was probably the first class proof of claim[24] filed under the Bankruptcy Act of 1898.[25]

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[18] *Id.* at 49 (citing Act of June 30, 1876, ch. 156, § 2, 19 Stat. 63). Section two of the Act of June 30,1876, provides:

> That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof . . . .

Act of June 30, 1877, ch. 156, § 2, 19 Stat. 63, *quoted in Richmond*, 121 U.S. at 49.

[19] *Richmond*, 121 U.S. at 46-49.

[20] *Id.* at 44; *see supra* note 16.

[21] *See* S. YEAZELL, *supra* note 12. A receivership is an equitable procedure whereby the court appoints a person to preserve and protect property which is the subject of pending litigation until a final adjudication is reached by the court. 1 H. TARDY, A TREATISE ON THE LAW AND PROCEDURE OF RECEIVERS §§ 1-2 (2d ed. 1920).

[22] S. YEAZELL, *supra* note 12, at 222. The law of receivership originated in America shortly after the American Revolution, when several of the original 13 colonies adopted constitutions which provided for chancery courts of equity with the power to utilize receivers. 1 R. CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 7 (1918). Since receivers were regarded as instrumentalities of the court, the development of the law of receivership coincided with the development of general rules of law in the court system. H. TARDY, *supra* note 21, § 1. The development of complex business practices, particularly with regard to corporations, resulted in the greatest use of receiverships. *Id.* § 2-3. A receiver in bankruptcy was a "temporary custodian of the property of the debtor against whom bankruptcy proceedings have been instituted or who has voluntarily come into court and asked to be adjudicated a bankrupt." 1 R. CLARK, *supra*, § 12(g). In England, where bankruptcy receivers acted on behalf of all creditors, the creditor's bill faded into disuse as a form of representative litigation. S. YEAZELL, *supra* note 12, at 222 n.24. In America, where the receivership operated to protect only the claims of specified creditors, it became necessary for creditors to pursue their claims individually in bankruptcy or to effect an assignment for the benefit of all creditors. *Id.* & n.24.

[23] No. 30-209 (E.D. Pa. 1971).

[24] Wohlmuth, *The Class Action and Bankruptcy: Tracking the Evolution of a Legal Principle*, 21 UCLA L. REV. 577, 592 (1973). This claim was filed under the Bankruptcy Act of 1898. *Id.*

[25] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *amended by* Act of June 22, 1938,

Commonwealth Finance involved a proof of claim filed on behalf of a class of indigent consumers against a bankrupt finance company.[26] Prior to a ruling on the validity of the class proof of claim, the finance company agreed to a settlement very favorable to the indigent consumers.[27] Even though *Commonwealth Finance* did not rule on the validity of class proofs of claims, the case did spark commentary in favor of allowing similarly situated creditors to file bankruptcy claims on a class basis.[28]

The first case to address squarely the validity of a class proof of claim under Federal Rules of Civil Procedure 23[29] was *In re Society of the Divine Savior*.[30] In *Divine Savior*, an annuitant, who had pur-

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ch. 575, 52 Stat. 840 (both repealed 1978). The law governing the applicability of FED. R. CIV. P. 23 in bankruptcy proceedings has changed several times. Note, *Class Actions in Bankruptcy*, 64 TEX. L. REV. 791, 792-93 (1985). When the first cases dealing with class proofs of claims surfaced, the law consisted of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, and the General Orders and Forms in Bankruptcy, 305 U.S. 677 (1939). Note, *supra*, at 792. In 1973, the General Orders and Forms were replaced by the Bankruptcy Rules, 11 U.S.C. app. (Supp. III 1973). Note, *supra*, at 792. In 1978, the Bankruptcy Act of 1898 was repealed and replaced by a new Bankruptcy Code, 11 U.S.C. §§ 101-151326 (1982). Note, *supra*, at 793. Finally, in 1983 the Bankruptcy Rules of 1973 were replaced by a new set of Bankruptcy Rules, 11 U.S.C. app. (Supp. I 1983), which, along with the 1978 Bankruptcy Code, makes up the current law. Note, *supra*, at 793.

[26] Bernstine & Charmatz, *In re* Commonwealth Finance Corporation: *Class Actions Against Sellers in Bankruptcy*, 6 CLEARINGHOUSE REV. 137, 138 (1972) (discussing unpublished *Commonwealth Finance Corp.* decision). The indigent consumers purchased defective washing machines from a retailer who subsequently went out of business. *Id.* The bankrupt finance company purchased the consumers' installment contracts from the retailer prior to filing its bankruptcy petition. *Id.* The class proof of claim was filed by the Community Legal Services of Philadelphia, Pennsylvania. *Id.*

[27] *Id.* The settlement agreement relieved the consumers of any further obligation regarding the installment contracts held by the bankrupt finance company. *Id.*

[28] *See id.* at 137-41 (stating that FED. R. CIV. P. 23 must apply in bankruptcy proceedings in order to protect consumers from unscrupulous commercial entities that become insolvent immediately after exploiting consumers); Schrag & Ratner, *Caveat Emptor—Empty Coffer: The Bankruptcy Law Has Nothing To Offer*, 72 COLUM. L. REV. 1147, 1176-78 (1972) (arguing that since Rule 23 class actions are allowed in ordinary civil litigation to protect consumers with similar claims, class litigation should also be allowed to retail bankruptcy proceedings).

[29] FED. R. CIV. P. 23.

[30] 15 Fed. R. Serv. 2d (Callaghan) 294 (Bankr. E.D. Wis. 1971). One case decided shortly before *Divine Savior* which did comment on class actions in bankruptcy, but not in the proof of claim context, was *In re* Penn Cent. Transp. Co., 328 F. Supp. 1273 (E.D. Pa. 1971), *aff'd*, 455 F.2d 976 (3d Cir. 1972). In *Penn Central Transportation Co.*, the district court denied the shareholder request to intervene as a class under Rule 23 in a railroad reorganization proceeding, holding Rule 23 to be inconsistent with the Bankruptcy Act of 1898. *Id.* at 1275. On appeal, the United States Court of Appeals for the Third Circuit did not address the Rule 23 issue. *Penn. Cent. Transp. Co.*, 455 F.2d at

chased an annuity from a religious society, filed a proof of claim on behalf of herself and all other annuitants in the bankruptcy proceedings of the religious society.[31] In holding that the annuitant could not proceed with the class proof of claim, the bankruptcy court articulated two distinct reasons as the basis of its decision.[32] First, the court determined that the provisions of the Bankruptcy Act of 1898 conflicted with class action suits provided for under Rule 23.[33] Second, the court found that many of the problems which justify class litigation were nonexistent in bankruptcy proceedings.[34]

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976. The Third Circuit later rejected an attempt to bring a class action in bankruptcy against bankrupt stockbrokers under specific statutory authority, this time declaring specifically that Rule 23 was an inappropriate vehicle for such an action. Securities & Exch. Comm'n v. Aberdeen Sec. Co., 480 F.2d 1121, 1128 (3d Cir. 1973).

[31] *Divine Savior*, 15 Fed. R. Serv. 2d (Callaghan) at 295-96. The Society of the Divine Savior was a nonprofit religious society consisting of some 300 members. *Id.* at 295. The society derived its income primarily from gifts and contributions. *Id.* Divine Savior had an investment grant program whereby donors contracted to contribute their life savings to the society in exchange for a modest periodic return. *Id.* After making some poor investment decisions, the society declared bankruptcy. *Id.* Petitioner's proof of claim sought a judicial order to place the assets acquired by Divine Savior through annuity proceeds in a trust for the benefit of the annuitants. *Id.* at 296.

[32] *Id.* at 298.

[33] *Id.* The court reasoned that since class litigation allowed members of the class to participate in any resulting recovery regardless of whether they participated of record, and since section 57 of the Bankruptcy Act required each and every creditor to file an individual proof of claim, then class proofs of claims violated the Bankruptcy Act. *Id.* Section 57(a) of the Bankruptcy Act of 1898 provided, in pertinent part: "A proof of claim shall consist of a statement under oath, in writing and signed by the creditor, setting forth the claim . . . ." Act of June 22, 1938, ch. 575, § 57(a), 52 Stat. 840, 866 (amending Bankruptcy Act of 1898, ch. 541, § 57(a), 30 Stat. 544, 546) (both repealed 1978).

[34] *Divine Savior*, 15 Fed. R. Serv. 2d at 298. The court noted that class litigation exists to avoid the problems caused by multiplicity of lawsuits with inconsistent results, litigation of the same issue in different forums, repetitious litigation on the same issues against a single defendant, and failure to provide small claimants a means to redress their claims. *Id.* The court explained that multiple suits in different forums were not possible in bankruptcy because all bankruptcy creditors stating a claim must do so in the bankruptcy court. *Id.* The court reasoned that since any favorable ruling on petitioner's claim would collaterally estop the debtor religious society from denying the validity of other similar claims, there was no need to provide small claimants a means to redress their claims which were otherwise too small to warrant individual litigation. *Id.* at 298-99. *But see* Wohlmuth, *supra* note 24, at 590 n.43 (claiming that *Divine Savior* court erroneously applied collateral estoppel doctrine in its rationale). Finally, the *Divine Savior* court concluded that there was little danger of the debtor religious society's being subjected to repetitious litigation because the failure of petitioner to establish her claim would likely discourage other similarly situated claimants from filing their claims. *Divine Savior*, 15 Fed. R. Serv. 2d at 299. The court recognized the possible impropriety of

The seminal decision in *Divine Savior* has been relied on by many other courts which have likewise rejected class proofs of claims.[35] The 1980 case of *In re Woodmoor Corp.*[36] followed and expanded the rule set forth in *Divine Savior*.[37] In *Woodmoor*, a purchaser of real estate filed a proof of claim in the bankruptcy of a real estate development corporation on behalf of himself and all other similarly situated buyers.[38] The proof of claim alleged that the bankrupt corporation breached its contractual obligation to provide certain amenities to a residential development.[39] In upholding the development corporation's objection to the class proof of claim,[40] the bankruptcy court cited *Divine Savior* as controlling precedent for the conclusion that class proofs of claims were unnecessary, as well as prohibited by the Bank-

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requiring petitioner to finance litigation personally; if successful, such litigation would benefit all other annuitants, but the court decided that this factor alone did not justify allowing the class proof of claim. *Id. Contra* Note, *supra* note 25, at 806-08 (stating that *Divine Savior* will lead to unfairness and inefficiency that could easily be avoided by use of Rule 23 class actions).

[35] Note, *supra* note 25, at 794. The *Divine Savior* court's analysis led to the general conclusion by other courts that "class action principles are antithetical to those of bankruptcy proceedings." *Id.*; *see, e.g.*, Novak v. Callahan (*In re* GAC Corp.), 681 F.2d 1295, 1298-99 (11th Cir. 1982) (following *Divine Savior* to reject allowability capacity of class proof of claim); Jezarian v. Raichle (*In re* Stirling Homex Corp.), 579 F.2d 206, 210 n.5 (2d Cir. 1978) (same); *In re* Arrow Air, Inc., 75 Bankr. 372, 373 (Bankr. S.D. Fla. 1987) (same); Dade County School Dist. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 53 Bankr. 346, 351 (Bankr. S.D.N.Y. 1985) (same); *In re* Grocerland Coop., 32 Bankr. 427, 435 (Bankr. N.D. Ill. 1983) (same); Pan Am. World Airways, Inc. v. Shulman Transp. Enters., Inc. (*In re* Shulman Transp. Enters., Inc.), 21 Bankr. 548, 551 (Bankr. S.D.N.Y. 1982) (same), *aff'd on other grounds*, 33 Bankr. 383 (Bankr. S.D.N.Y. 1983); Parker & Plevin, *Ruling Authorizing Class Filings Prejudices Individual Claimants*, NAT'L L.J., July 4, 1988, at 30 (stating that no published decision has authorized class proofs of claims); *see also* 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1754, at 546-47 (2d ed. 1986) [hereinafter FEDERAL PRACTICE & PROCEDURE] (stating that potential application of Rule 23 to bankruptcy is limited because all creditors must file individual proofs of claims). *But see* Wohlmuth, *supra* note 24, at 577, 598 (advocating class proofs of claims because bankruptcy procedure has class litigation concepts inherent in its framework).

[36] 4 Bankr. 186 (Bankr. D. Colo. 1980).

[37] Note, *supra* note 25, at 808. In addition to concluding that class actions are unnecessary in bankruptcy proceedings, the *Woodmoor* court also supported the proposition that such class actions violated general bankruptcy principles. *Id.*

[38] *Woodmoor*, 4 Bankr. at 187-88.

[39] *Id.* at 188. Claimants asserted that Woodmoor Corporation promised that, among other things, roads, water, sewer facilities, electricity, and recreational facilities would be provided. *Id.*

[40] *Id.* at 194.

ruptcy Act of 1898.[41] In addition, the court reasoned that allowing a creditor to utilize a class proof of claim would divest class members of their right to control the prosecution of their claims individually — a right which was inherent in the Bankruptcy Act of 1898.[42] Basing its conclusion on this analysis, the court held that class actions were precluded in bankruptcy proceedings.[43]

Judicial treatment of class proofs of claims did not change when

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[41] *Id.* at 192; *see supra* notes 34, 35 and accompanying text.

[42] *Woodmoor*, 4 Bankr. at 194. In its conclusion concerning the class proof of claim issue, the court stated that "claims against a bankrupt estate may not be treated *en masse* but instead each must be treated on its own merits." *Id.* at 192; *see* 3 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 58.18[7] (14th ed. Supp. 1984) (quoting *Woodmoor*). *Contra* Note, *supra* note 25, at 809 (bankruptcy principles do not preclude claimants from pooling resources and proceeding under Rule 23 class action).

[43] *Woodmoor*, 4 Bankr. at 194. The *Woodmoor* court did discuss R. BANK. P. 723, which provided for the application of FED. R. CIV. P. 23 in "adversary proceedings." *Woodmoor*, 4 Bankr. at 188. The court denied application of Rule 723 by declaring objections to proofs of claims to be "contested matters," not "adversary proceedings," and by holding that petitioner's claim was insufficient under Rule 23. *Id.* at 188-89; *cf.* Wohlmuth, *supra* note 24, at 591 n.47 (stating that Bankruptcy Rules authorize some use of class action in bankruptcy proceedings but do not specifically authorize class proofs of claims).

The terms "contested matters" and "adversary proceedings," as used in the Bankruptcy Rules, are terms of art. 1 D. COWANS, BANKRUPTCY LAW AND PRACTICE § 3.20, at 345 (1989). In a general sense, adversary proceedings are more formal than contested matters. *Id.* § 3.19(a)(2), at 264. Part VII of the Bankruptcy Rules, which governs adversary proceedings, adopts many of the Federal Rules of Civil Procedure. *Id.* Thus adversary proceedings are said to adhere more closely to the litigation mode of other federal courts. *Id.* However, contested matters are litigated just as fervently as adversary proceedings in some situations. *Id.* § 3.20, at 345. The major discernible difference between contested matters and adversary proceedings is procedural. *Id.* Litigants in adversary proceedings are normally represented by attorneys, while litigants in contested matters often proceed without counsel. *Id.* Also, contested matters are initiated with a motion, unlike adversary proceedings, which require a pleading. *Id.*

After *Woodmoor* a few courts did apply Rule 23 to bankruptcy proceedings, but only when all class creditors met the *Divine Savior* requirement of filing individual proofs of claims. *See* United States Truck Co., Inc. v. Teamsters Nat'l Freight Indus. Negotiating Comm. (*In re* U.S. Truck Co.), 89 Bankr. 618, 623 (Bankr. E.D. Mich. 1988) (union claim on behalf of members allowed when individual claims listed and no uncertainty as to value existed); *In re* Continental Airlines Corp., 64 Bankr. 874, 880-81 (Bankr. S.D. Tex. 1986) (unions cannot file claims on behalf of members *en masse* when no attempt was made to list individual claims); *In re* W.T. Grant Co., 24 Bankr. 421, 424 (Bankr. S.D.N.Y. 1982) (applying Rule 23 to class of employees who filed individual proofs of claims against bankrupt employer); *In re* REA Express, Inc., 10 Bankr. 812, 813-15 (Bankr. S.D.N.Y. 1981) (applying Rule 23 to class of claimants who filed individual proofs of claims and allowing class action to proceed).

the Bankruptcy Code replaced the Bankruptcy Act of 1898.[44] In the case of *In re Baldwin-United Corp.*,[45] several class proofs of claims were filed in the bankruptcy of an investment company by groups of securities purchasers alleging fraud on the part of the company.[46] The bankruptcy court rejected the creditors' class proofs of claims, basing its decision on three rationales.[47] First, the court determined that class proofs of claims were directly prohibited by the Bankruptcy Code and the Bankruptcy Rules.[48] Second, the court found that Bankruptcy Rules 7023 and 9014, which provide for the application of Rule 23 class litigation in certain circumstances, did not apply to the proof-of-claim stage of a bankruptcy proceeding.[49] Finally, the court reasoned that

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[44] *See* Note, *supra* note 25, at 793.

[45] 52 Bankr. 146 (Bankr. S.D. Ohio 1985).

[46] *Baldwin-United*, 52 Bankr. at 147. Two general types of claims were involved. *Id.* One type of claim was filed on behalf of allegedly defrauded securities purchasers, while the other type was filed on behalf of allegedly defrauded annuity purchasers. *Id.*

[47] *Id.*

[48] *Id.* at 147-49. The court relied primarily on § 501 of the Bankruptcy Code, 11 U.S.C. § 501 (1983), which sets forth who may file a proof of claim. *Baldwin-United*, 52 Bankr. at 148. Section 501 provides that "[a] creditor or an indenture trustee may file a proof of claim." 11 U.S.C. § 501(a) (1982). The court pointed out that the Code did not define "creditor" as a representative of a class of creditors. *Baldwin-United*, 52 Bankr. at 148. Relying on these findings, the court concluded that since representative claimants were not included in § 501 or any other provision of the code, class proofs of claims were prohibited by the Bankruptcy Code. *Id.* at 148-49; *see In re* Electronic Theatre Restaurants Corps., 57 Bankr. 147, 148 (Bankr. N.D. Ohio 1986)(holding that exclusion of representative claimant from § 501 listing of permissible filings of proofs of claims precludes class proofs of claims); Dade County School Dist. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 53 Bankr. 346, 350-51 (Bankr. S.D.N.Y. 1985) (same). *See generally* S. REP. No. 989, 95th Cong., 2d Sess. 61 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5847 (indicating Senate's awareness of representative proof-of-claim concept by language concerning indenture trustee as representative claimant under § 501 and implying that exclusion of other representative claimants from § 501 was Senate's intent); H.R. REP. No. 595, 95th Cong., 1st Sess. 351 (1977) (same).

In analyzing the Bankruptcy Rules, the *Baldwin-United* court pointed to Rule 3001(b) as being dispositive on the class proof-of-claim issue. *Baldwin-United*, 52 Bankr. at 148. Rule 3001(b) provides in relevant part that "[a] proof of claim shall be executed by the creditor or the creditor's authorized agent . . . ." R. BANKR. P. 3001(b). The court reasoned that since the representatives who filed the class proofs of claims did not qualify as authorized agents of the class, the class proofs of claims were precluded by Rule 3001(b). *Baldwin-United*, 52 Bankr. at 148; *see In re* Arrow Air, Inc., 75 Bankr. 372, 373 (Bankr. S.D. Fla. 1987) (holding that Rule 3001(b) prohibits representative filings of proofs of claims outside authorized agency relationship); *Electronic Theatre*, 57 Bankr. at 148-49 (same); *Johns-Manville*, 53 Bankr. at 350 (same); *In re* Grocerland Coop., 32 Bankr. 427, 434-35 (Bankr. N.D. Ill. 1983) (same); *In re* Woodmoor Corp., 4 Bankr. 186, 192 (Bankr. D. Colo. 1980) (same).

[49] *Baldwin-United*, 52 Bankr. at 149. Rule 7023 states: "Rule 23 F[ed]. R. Civ. P.

since some 400 claimants did file individual proofs of claims, it was not inequitable to require the remainder of the claimants to file individual proofs of claims also.[50]

The initial court of appeals to address the class proof-of-claim issue under the 1978 Bankruptcy Code and the 1983 Bankruptcy Rules[51] was the United States Court of Appeals for the Tenth Circuit in *Sheftelman v. Standard Metals Corp.*[52] In *Standard Metals*, a holder of industrial development bonds filed a proof of claim in the bankruptcy of a mining company on his own behalf and on behalf of other similarly situated bond purchasers.[53] The representative claimant alleged that the debtor mining company had committed fraud in violation of both federal and state securities laws.[54] In ruling on the lower court's decision to deny the class proof of claim,[55] the Tenth Circuit handed down a comprehensive opinion, relying on many of the prior cases ruling on this issue of law;[56] and, like the preceding courts, the

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applies in adversary proceedings." R. BANKR. P. 7023. The court held that Rule 7023 did not expressly allow the class proofs of claims because the filing of a proof of claim is not an "adversary proceeding," but a "contested matter." *Baldwin-United*, 52 Bankr. at 149; *see* Novak v. Callahan (*In re* GAC Corp.), 681 F.2d 1295, 1299 (11th Cir. 1982) (holding that Bankruptcy Rule 7023 does not apply to non-adversarial filing of proof of claim); *Electronic Theatre*, 57 Bankr. at 148 (same); *In re* Computer Devices, Inc., 51 Bankr. 471, 474 (Bankr. D. Mass. 1985) (same). Rule 9014 allows a bankruptcy court in its discretion to apply any Part VII Bankruptcy Rule, which includes Rule 7023, at any stage of a "contested matter." R. BANKR. P. 9014. The *Baldwin-United* court determined that the proof-of-claim procedure was not sufficiently serious or complicated to warrant the use of Rule 9014. *Baldwin-United*, 52 Bankr. at 150; *cf.* Lazard v. Texaco, Inc. (*In re* Texaco, Inc.), 81 Bankr. 820, 826-27 (Bankr. S.D.N.Y. 1988) (holding that Rule 9014 cannot circumvent requirement of individual proof of claim); *Computer Devices*, 51 Bankr. at 474 (denying Rule 9014 motion because class action procedures should not apply to bankruptcy claims litigation per se); *GAC Corp.*, 681 F.2d at 1299 (denying applicability of Rule 9014 because representative creditor failed to move for its application).

[50] *Baldwin-United*, 52 Bankr. at 150-51. The representative creditors argued that class litigation was the only viable means of recovery for a majority of the creditors and that the individual claim requirement was thus inequitable. *Id.* at 150.

[51] *See supra* note 25.

[52] 817 F.2d 625 (10th Cir. 1987).

[53] *Standard Metals*, 817 F.2d at 626-27. Standard Metals Corporation owned a controlling interest in a New Jersey smelting company which was financed through the sale of tax-exempt industrial revenue bonds. *Id.* at 627. Both the parent company and the subsidiary filed voluntary bankruptcy petitions. *Id.*

[54] *Id.*

[55] *In re* Standard Metals Corp., 48 Bankr. 778, 783 (Bankr. D. Colo. 1985), *aff'd. sub nom.* Sheftelman v. Standard Metals Corp., 817 F.2d 625, 625 (10th Cir. 1987).

[56] *Standard Metals*, 817 F.2d at 631-32. The court relied on arguments expressed in *Divine Savior* and *Baldwin-United*. *Id.* at 631; *see supra* notes 30-35, 45-51 and accom-

Standard Metals court also rejected the class proof of claim.[57] While holding the petitioner's class proof of claim to be violative of the statutory scheme of the Bankruptcy Code and the Bankruptcy Rules,[58] the Tenth Circuit emphasized that neither the Code nor the Rules expressly prohibit or permit class proofs of claims.[59] Significantly, the court recognized that class bankruptcy actions might be appropriate in some particular circumstances,[60] but the court was careful to point out that such circumstances could not circumvent the strict requirement that each creditor file an individual proof of claim.[61] In conclusion, the Tenth Circuit found that class proofs of claims were unnecessary as well as prohibited because the historical rationale behind class litigation—avoidance of multiplicity of suits in a variety of forums[62]—was inapplicable to bankruptcy in light of the fact that bankruptcy courts exercise complete control over a debtor's estate under modern bankruptcy law.[63]

In the instant case, the United States Court of Appeals for the Seventh Circuit found that since section 501 of the Bankruptcy Code,[64] which provides for only three types of representative filings of claims, is not exclusive, then the Bankruptcy Code does not bar class proofs of claims.[65] The court reasoned that the representative in a class action is

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panying text. In analyzing the Bankruptcy Rules, the *Standard Metals* court emphasized the significance of the Rule 3001(b) requirement that a proof of claim be filed by a claimant or a claimant's authorized agent. *Standard Metals*, 817 F.2d at 631; *see supra* note 49 and accompanying text.

[57] *Standard Metals*, 817 F.2d at 632.

[58] *Id.* at 630.

[59] *Id.* at 631.

[60] *Id.* at 632; *see, e.g.*, *In re* REA Express, Inc., 10 Bankr. 812, 813 (Bankr. S.D.N.Y. 1981) (allowing class of employees who filed individual proofs of claims to proceed in class action). The *Standard Metals* court determined that class litigation was only applicable to bankruptcy for the purpose of consolidating a large number of similar claims filed by individual creditors. *Standard Metals*, 817 F.2d at 632.

[61] *Standard Metals*, 817 F.2d at 632.

[62] *Id.*; *see In re* Four Seasons Sec. Laws Litig., 502 F.2d 834, 843 (10th Cir.) (primary reason for allowing class of individuals to join in filing common suit is to avoid multiplicity of litigation in numerous forums), *cert. denied*, 419 U.S. 1034 (1974).

[63] *Standard Metals*, 817 F.2d at 632; *see* FEDERAL PRACTICE & PROCEDURE, *supra* note 35, § 1754 (bankruptcy court exercises complete control over administration of debtor's estate).

[64] 11 U.S.C. § 501 (1982); *see supra* note 9.

[65] *In re* American Reserve Corp., 840 F.2d 487, 492-93 (7th Cir. 1988). The court pointed out that the list of three types of representative claims provided for in § 501 may imply only that Congress has yet to consider the propriety of class proofs of claims. *Id.* The court further noted that the legislative history of § 501 did not discuss class litigation. *Id.* The court concluded its discussion of the § 501 issue by pointing out that an

an agent for the missing petitioners, who becomes an authorized agent upon class certification, and thus Bankruptcy Rule 3001(b),[66] which requires proofs of claims to be filed by creditors or creditors' authorized agents, also does not preclude class proofs of claims.[67]

Furthermore, the court found that Bankruptcy Rule 7023,[68] which provides for class actions in adversary proceedings, and Bankruptcy Rule 9014,[69] which applies to contested matters, work to allow the bankruptcy court discretion to apply Rule 7023 at any stage in the proceeding.[70] Because all bankruptcy disputes are either adversary proceedings or contested matters,[71] the Rules of Bankruptcy Procedure allow a bankruptcy judge at his or her discretion to certify class litigation at the proof-of-claim stage of a bankruptcy proceeding.[72] The court further reasoned that class actions in general often provide compensation to class members and deterrence to wrongdoers that is not otherwise attainable through procedural methods; therefore, class litigation should be considered an option within, as well as outside, bankruptcy.[73] In conclusion, the court held that since bankruptcy proceed-

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exclusive interpretation of § 501 would effectively eliminate Bankruptcy Rule 7023, which explicitly provides for class litigation, as well as Bankruptcy Rule 3001(b), which allows proofs of claims by authorized agents of creditors. *Id.*

[66] R. BANKR. P. 3001(b).

[67] *American Reserve Corp.*, 840 F.2d at 493. The court emphasized that without a class certification the representative is not the authorized agent of the class of claimants and that each claimant would thus be required to file an individual proof of claim. *Id.*

[68] R. BANKR. P. 7023. Rule 7023 provides: "Rule 23 F[ed]. R.C.P. applies in adversary proceedings." *Id.*; *see supra* note 49 and accompanying text.

[69] R. BANKR. P. 9014. Rule 9014 states that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." *Id.* Rule 7023 is a Part VII rule. *American Reserve Corp.*, 840 F.2d at 488; *see* D. COWANS, *supra* note 43, § 3.19(a)(2), at 2641 (all bankruptcy disputes are considered either adversary proceedings or contested matters).

[70] *American Reserve Corp.*, 840 F.2d at 488.

[71] *Id.*; *see* 1 D. COWANS, *supra* note 43, § 3.19(a)(2), at 264 (all bankruptcy disputes are considered either adversary proceedings or contested matters).

[72] *American Reserve Corp.*, 840 F.2d at 488. The court made it explicitly clear that the proof-of-claim procedure is a "stage" in the bankruptcy proceeding for purposes of Rule 9014, which grants discretion to the trial judge to implement Rule 7023 on class actions during any stage of the proceeding. *Id.*

[73] *Id.* at 489. The court noted that inside bankruptcy the combination of contingent claims, which are not easily identifiable to the claimant, and the effort required to pursue an identified claim, which involves investigation into facts and law, along with opportunity costs, disregards claimants who hold small stakes dependent on class actions for litigation of their claims. *Id.* The court thereby concluded that class litigation thus provides compensation not otherwise available to some bankruptcy claimants. *Id.* The court recognized, however, that the costs of class litigation, coupled with the fact that a high

ings involving larger stakes[74] may provide substantial prospects of compensation or deterrence as a result of class litigation without unduly complicating or delaying the case,[75] the policies inherent in bankruptcy[76] require that the class action be utilized in such scenarios.[77]

American Reserve represents a major change in the law regarding class litigation during the proof-of-claim stage of a bankruptcy proceeding.[78] Prior to the instant case, courts uniformly rejected class proofs of claims on the basis of a variety of arguments.[79] For the most

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proportion of any recovery is normally diverted to the class' attorney, makes the compensatory advantage of class litigation minimal when the stakes held by the claimants making up the class are small. *Id.* at 489-90.

The court noted that even though the costs of litigation consume much of the compensatory benefit of class litigation, the device still acts as a deterrent by ensuring that wrongdoers pay for their activities. *Id. See generally* Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUDIES 47, 54-56 (1975) (discussing deterrent effect of class litigation). The court conceded, however, that deterrence is less likely in bankruptcy than in other types of class actions because the threat of extracting money from a bankrupt entity has virtually no effect on the entity's manager and investors, whereas such a threat on a liquid entity induces managers and investors to police the company's conduct. *American Reserve Corp.*, 840 F.2d at 490-91.

[74] *American Reserve Corp.*, 840 F.2d at 492; *see supra* note 72.

[75] *American Reserve Corp.*, 840 F.2d at 491. The court rejected the debtor's argument that class proofs of claims will unduly complicate or delay bankruptcy proceedings. *Id.* The debtor claimed that class litigation would force bankruptcy courts to await the end of the action to determine the entitlement of other creditors not in the class because until that point the number of class members who will appear to collect is uncertain. *Id.* The court pointed out that since Rule 23 requires courts handling class actions to certify promptly or reject a proposed class and to notify class members so that disinterested members can opt out, the class members interested in recovery are identified early in the proceeding. *Id.*

[76] *Id.* at 492. The court stated that "bankruptcy courts exist to marshal assets and make awards justified by non-bankruptcy entitlement." *Id.*

[77] *Id.* The court also discussed two additional problems involved in class actions. *Id.* at 490. The court pointed out that class actions are extremely unpopular with judges because of the complexities and steep costs inherent in class litigation. *Id.* Also, the court noted that class actions force the presiding court to monitor the class attorney's performance because normally the stakes held by the class are too small to warrant monitoring by the individuals in the class. *Id.*

[78] *See supra* notes 35, 48-49, 65, 69 and accompanying text.

[79] *See supra* notes 35, 48-49 and accompanying text.

In *In re* Charter Co., 876 F.2d 866 (11th Cir. 1989), the court observed that only two circuits of the federal courts of appeal had spoken on this issue prior to that decision. *Id.* at 869. The Tenth Circuit had refused to allow a class proof of claim in Sheftelman and Standard Metals Corp., 817 F.2d 625, 630 (10th Cir. 1987). *Charter*, 876 F.2d at 869; *see supra* note 52 and accompanying text. The instant case, *American Reserve*, had been the only other decision among the circuits to address the problem. *Charter*, 876 F.2d at 869. The *Charter* court followed the lead of *American Reserve* and allowed a claimant to file

part, these prior cases turned on various statutory interpretations and not on particular problems found to be caused by class proofs of claims.[80] Ironically, as *American Reserve* points out, class proofs of claims do arguably comply with the letter and spirit of both the Bankruptcy Code and the Bankruptcy Rules.[81]

As a matter of public policy, the *American Reserve* decision is a step forward.[82] Class proofs of claims protect the interests of small claimants whose stakes are not large enough to make individual litigation economically feasible.[83] In the retail sales environment, small volume consumers have no realistic protection against the unscrupulous retailer who declares bankruptcy immediately after exploiting the consuming public unless class proofs of claims are permitted.[84] The instant case does not provide for an unbridled use of class litigation in bankruptcy.[85] On the contrary, the court in *American Reserve*, through a logical reading of current bankruptcy law,[86] held that class proofs of claims should be allowed at the discretion of the bankruptcy court only after the court weighs the advantages and disadvantages of allowing such a procedure.[87] The influential *American Reserve* decision, by carefully delineating the criteria under which class proofs of claims should be allowed, directs bankruptcy courts to allow class proofs of claims only when the economic and policy advantages of such claims outweigh the judicial and administrative problems inherent in class litigation.[88] Furthermore, from a practical standpoint, *American Reserve* will not cause procedural problems for bankruptcy courts in the future because the mechanics of bankruptcy will remain virtually unchanged by the decision because of the inherent similarities between the concepts of bankruptcy and class litigation.[89]

John G. Wheeler

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a class proof of claim in bankruptcy. *Id.* at 869, 876. After the *American Reserve* decision, the Sixth Circuit followed suit, allowing a class proof of claim in bankruptcy in Reid v. White Motor Corp., 886 F.2d 1462 (6th Cir. 1989).

[80] *See supra* notes 33-35, 41-42, 48-49 and accompanying text.

[81] *See supra* notes 68-71 and accompanying text.

[82] *See supra* notes 28, 72 and accompanying text.

[83] *See supra* notes 28, 72 and accompanying text.

[84] *See supra* note 28 and accompanying text.

[85] *See supra* note 11 and accompanying text.

[86] *See supra* notes 68-71 and accompanying text.

[87] *See supra* notes 11, 71, 74-76 and accompanying text.

[88] *See supra* notes 11, 71-72, 76 and accompanying text.

[89] *See supra* notes 24, 28, 34, and accompanying text.

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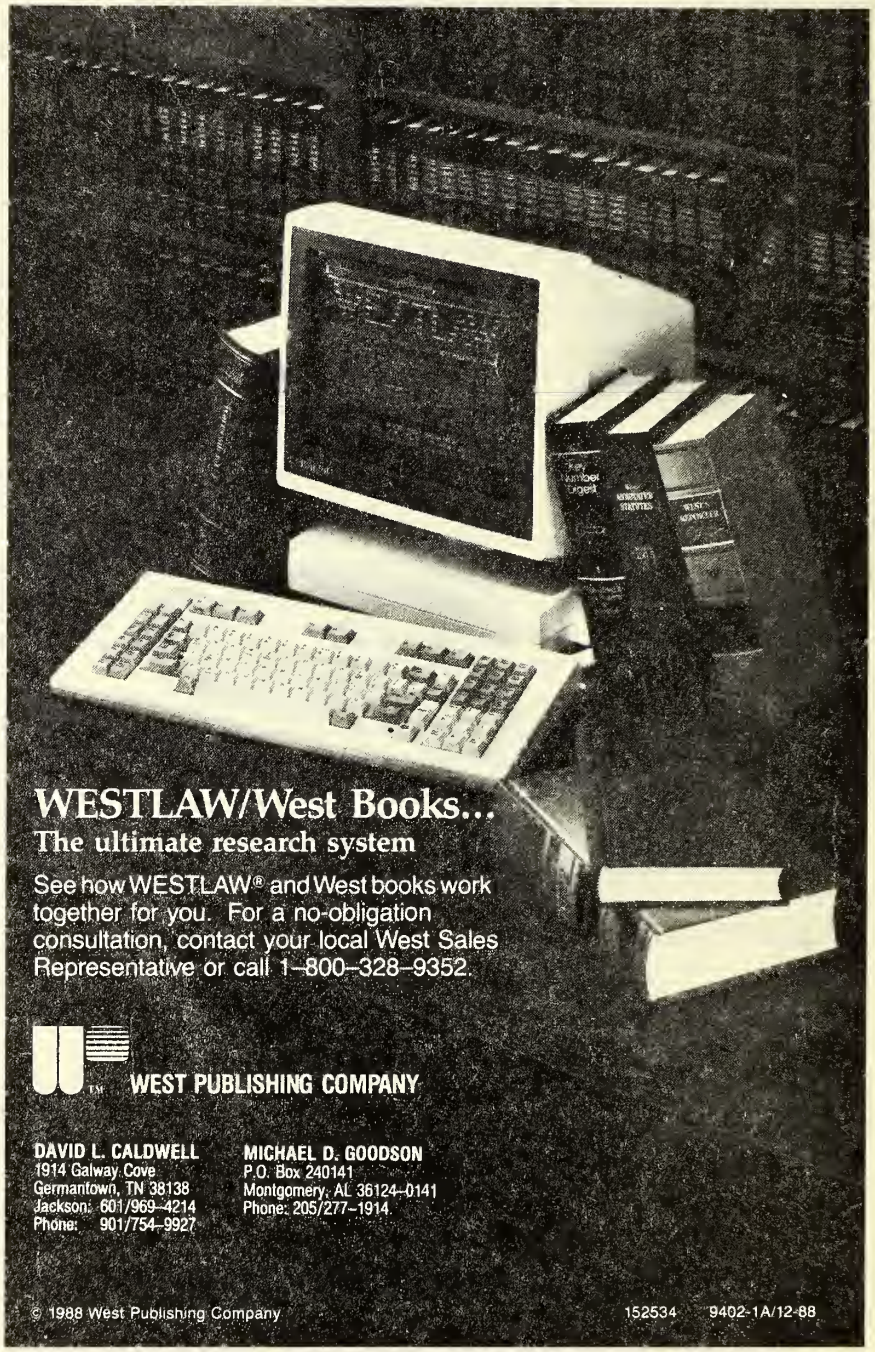
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